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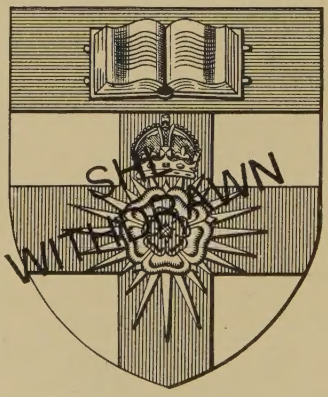

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1948

EDITED BY

GEORGE W. KEETON

AND

GEORG SCHWARZENBERGER

On behalf of
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PREFACE

THE FACULTY of Laws at University College, London established in 1946 a series of weekly public lectures on Current Legal Problems during the First and Second Terms of each Session. The purpose of these lectures is to enable students and members of the public to acquaint themselves with topical problems of more than merely technical interest and to give an opportunity to members of the Laws Faculty to address a wider audience than is usually at the disposal of the academic teacher of law on subjects of research in which they happen to be engaged.

Owing to many requests from inside and outside the College to make these lectures available in a more permanent form, it has been decided to publish them as an annual series. It is hoped that this publication will help to keep former students in the Faculty in close touch both with the College and with recent developments in the legal field.

Volume One of *Current Legal Problems* contains the lectures which were delivered during the Session 1947–1948 and a Special University Lecture given at the College by Professor A. de la Pradelle under the auspices of the Faculty of Laws in the University of London. We wish to express our thanks to the University of London for so willingly granting permission to publish this lecture in this Annual.

We should also like to thank Mr. FitzGerald, the Assistant Editor of this Volume of *Current Legal Problems,* for having compiled the Tables of Cases, Statutes and Treaties and the Index.

THE EDITORS

University College, London
March, 1948

I

JEREMY BENTHAM AND THE LAW (1748-1948)*

H. F. Jolowicz

Only a little less than 200 years ago it became obvious that Jeremy Bentham was an extremely precocious child—not a robust youngster with the waywardness of genius, but a frail little boy who read voraciously and was very good at his lessons. His father, proud of his talents and ambitious for him, was a wealthy attorney with plenty of connections in the law, and the obvious prediction for any one to make was that Jeremy, if he survived at all, would finally disappear ignominiously in a large practice at the Bar.

Nothing of the sort happened. He was indeed called to the Bar, but from the first he was nauseated by practice, and, after 'opening a bill two or three times' right at the beginning of his career, he never again, throughout his long life, held a brief. In this alone there would be nothing surprising, 'For many are called, but few are chosen'. But Bentham did not simply give up the law as something that did not interest him. On the contrary, by one of those paradoxes of which his nature was so full, it was in connection with the law especially that he became famous. Not indeed in law alone, for he was a philosopher and an economist also, but his philosophy was perhaps never of a very high order, and too many flaws have been discovered in the utilitarian position for it to be of much account today, while his economic writings are rather lost in those of other exponents of *laisser-faire* principles. Even in law, however, his position is very peculiar. As has often been remarked, he is at once the most theoretical and the most practical of jurists. He spent an immense amount of labour on the analysis of the general idea of law and of individual legal conceptions, even building up a language of his own, some words of which have penetrated into general usage, but the bulk of which is far too finicking and

* A lecture delivered at University College, London, on February 5, 1948.

pedantic for popular or professional use. His theories became, largely through Austin, the basis of most academic teaching of jurisprudence in England until after the end of the nineteenth century, and abroad, where Austin was until recently almost unknown, Bentham is probably the best known English name in the theory of law. And he was not only theoretical, he was even slightly absurd with his new words and his childish invectives against the 'sinister interest' of most public persons, and of lawyers in particular. How then are we to explain the undoubted fact that he was not only a prime mover in the law-reforming period of the nineteenth century, but also suggested a number of specific changes which have been put into effect with undeniable success?

Let us first ask why he disliked practice. No doubt his aversion was in part constitutional. His physical weakness as a child seems to have made him shy and awkward in society. When he met 'the great', as he did quite often at Lord Shelburne's house in Wiltshire, he did not stand up to them in a way which his intellectual attainments would have justified. He was 'monstrously frightened at' Pitt, though he admits after meeting him that they might become 'good pax' if they were thrown together,[1] and he evidently did not react in a spirited manner when Lord Camden rudely said to him 'You eat too much, Mr. Bentham. Reading so much as you do, two or three ounces a day should be sufficient for you'.[2] It was in fact with him as it was with Gibbon. Gibbon, too, suffered from ill-health in childhood and was, as he said, 'not armed by nature and education with the intrepid energy of mind and voice *vincentem strepitus et natum rebus agendis*', so that, in spite of a lively understanding of politics, he sat mute through eight sessions of the House of Commons.[3] Both men, however, compensated for their diffidence in public by great self-confidence in private and in their writings. With Bentham this was, from the first, phenomenal, as the mere fact that he began his literary career with an attack on the established reputation of Blackstone is sufficient to show. There are plenty of other examples in his works, but I

[1] *Works* (ed. Bowring), Vol. 10, p. 100.
[2] Preface to the second edition of *A Fragment on Government*, *Works*, Vol. 1, p. 250.
[3] *Autobiography* (Everyman's ed.), p. 142.

will only cite one, not so far as I know published, from some manuscript notes (dated 1830) on a Bill of Brougham's: 'J.B's style a model, Brougham's in this Bill a beacon', and again, 'Comprehensiveness, foresight and correctness exemplified in J.B's draughts'.[4]

But if Bentham's aversion to practice was in part due to an instinctive shrinking from the rough-and-tumble, it was also, or at least became, rational, for it was reinforced very early by two closely related elements, his philanthropic nature and his intellectual dislike of muddle. The two are closely related because in 'utility' he found, as he thought, a principle which would clear away all muddles, as well as one which persuaded him that in clearing away the muddle he would be serving the cause of humanity. It has always been a stumbling-block in the utilitarian theory that though it may be true that each person seeks his own pleasure, that fact does not supply a reason why the legislator *should* seek the greatest happiness of the greatest number. Bentham, as a would-be legislator, did so because he was more appreciative of what he called the 'pleasures of benevolence' than most people. He gives himself away on that point when he says that on reading that part of Hume's *Treatise on Human Nature* which dealt with utility he felt as if scales had fallen from his eyes. 'I then', he says, 'for the first time, learned to call the cause of the People the cause of Virtue'.[5] At the end of his life, reflecting on his career, he remarked that he was a selfish man, as selfish as any man could be, but that somehow or other in him selfishness had taken the form of benevolence.[6] People who dislike him take him at his word here: they quote, too, what J. S. Mill said about his lack of experience in ordinary human passions,[7] and regard his interest in humanity as no more than that of a calculating machine in the correctness of an addition. When one considers his kindness to individuals, his enormous sacrifices to get the Panopticon scheme adopted, and some of his passionate denunciations of tyranny, this seems to me unjust. None the less, one must recognise that the purely

[4] University College, London, MSS., Portfolio 4, folder 78.
[5] *Works*, Vol. 1, p. 268.
[6] *Works*, Vol. 11, p. 95.
[7] J. S. Mill, *Dissertations* (1859), Vol. 1, pp. 354–355, quoted by E. L. Woodward, *The Age of Reform* (1938), p. 34.

intellectual element in his revolt against established institutions was very strong, and especially in the initial stages.[8]

At the age of sixteen he heard Blackstone's lectures at Oxford, 'even then', he tells us, 'no small part of them with rebel ears'.[9] At that time he could not have had any knowledge of law to enable him to criticise the lecturer's matter, nor could he as yet have formed the opinion that Blackstone's methods were inimical to progress. As is clear from his description, it was the weakness of the arguments that appalled him. 'I immediately detected his fallacy concerning natural rights; I thought his notions very frivolous and illogical about the gravitating downwards of *hæreditas*; and his reasons altogether futile, why it must *descend* and not *ascend*'.[10] Even then he could see the difference between a reason and a metaphor, and instead of swallowing the metaphor like a dutiful student, he let it stick in his throat. When he was a little older and came to write the *Fragment on Government* and the *Comment on the Commentaries* his main object was, no doubt, to discredit that Blackstonian optimism which represented existing English law as the perfection of reason, but the method he adopted was to show not that what Blackstone said was wrong, but that, when analysed, it meant nothing at all. 'What distresses me', he says, 'is not meeting with any positions such as, thinking them false, I find a difficulty in proving them so: but the not meeting any positions, true or false (unless it be here and there a self-evident one), that I can find a meaning for'.[11] And both these early works merely elaborate this criticism. Take for example what he makes of Blackstone's definition of a municipal law as 'a rule of civil conduct prescribed by the supreme power in a state commanding what is right, and prohibiting what is wrong'. After a long discussion this is shown to mean 'a rule of conduct for those who are to observe it, prescribed by those who prescribe it, commanding what it commands, and forbidding what it forbids.[12] It sometimes seems that these demonstrations are not only tedious—as he said they

[8] Cf. 'By an early pamphlet of Priestley's, the date of which has fled from my recollection, light was added to warmth', quoted by Bowring as having been written in 1822. *Works*, Vol. 10, p. 79.
[9] Preface to the second edition of the *Fragment*, *Works*, Vol. 1, p. 249.
[10] *Works*, Vol. 10, p. 45.
[11] *Works*, Vol. 1, p. 268.
[12] *A Comment on the Commentaries* (ed. Everett), p. 73.

were [13]—but are rather like breaking a butterfly on the wheel, for what is said in Blackstone's *Introduction* was really common form at the time, to which he probably attached little importance himself in comparison with the statement of English law, and which we know to have been lifted in part from other writers. Much of it is, as Bentham said, rhetoric, and we are inclined to pass it by with a smile. Bentham could not; it revolted his logical sense. As he told his father in 1772, when declaring that his work on the *Elements of Critical Jurisprudence* must take precedence over practice of the law, he 'could not rest anywhere until he had got to the bottom',[14] or, in other words, he must get the theoretical basis clear before he went into details. The intellectual nature of his approach is also indicated by the constant reiteration of his debt to the philosophers, as opposed to his equally constant claim to originality where law is concerned, for he based his legal theories on philosophy. Not only is he constantly quoting Locke and Hume, but he says specifically in one place '*Ce n'est pas dans les livres de droit que j'ai trouvé des moyens d'invention et des modèles de méthode: c'est plutôt dans les ouvrages de métaphysique. . . . Ce que j'ai trouvé dans les Tribonien, les Cocceji, les Blackstone, les Vattel, les Pothier, les Domat, est bien peu de chose: Hume, Helvétius . . . m'ont été bien plus utiles*'.[15]

He never claimed priority for the conception of utility, though he was perhaps not quite consistent in his accounts of the source from which he got it. Priestley had certainly a good deal to do with his conversion to the doctrine, and on committing 'the first rough and imperfect outline' of a scheme derived from Priestley to paper he felt, he says, 'the sensation of Archimedes',[16] *i.e.* intellectual satisfaction. Archimedes was not thinking of the benefits that would accrue to humanity from his discovery. This intellectual approach of Bentham's coupled with his extreme self-confidence and the nature of the theory to which he swore allegiance so early had one very important effect. He never read law disinterestedly with a view to learning about

[13] 'A logomachy wearisome enough, perhaps, and insipid to the reader, but beyond description laborious and irksome to the writer', *Works*, Vol. 1, p. 295.

[14] Quoted by Everett, *op. cit.* (Note 12 above), p. 1.

[15] *Discours Preliminaire to the Civil Code*, quoted by Halévy, *La formation du radicalisme philosophique*, Vol. 1, p. 308, n. 32.

[16] *Works*, Vol. 10, p. 80. Cf. *Deontology* (ed. Bowring), p. 300.

it. Dicey says that he 'had studied the law of England more profoundly than had many Lord Chancellors', but he adds that 'he had studied it only with a view to removing its defects'.[17] In other words, he started with a prejudice, and regarded the actual acquisition of legal knowledge purely as the means to an end. And, though of course he must have been marvellously quick in acquiring information, he probably underrated the difficulty which real assimilation presented even to him. Some light on his attitude is, I think, shown by a remark he made in a letter to his brother in 1775, when he was engaged on the *Comment on the Commentaries,* but was also contemplating other work for the purpose of earning enough to marry Miss Dunkly in spite of his father's disapproval of the match. 'I believe', he says, 'I shall spend the next half year at Mr. Lind's. . . . Mr. Lind will assist me in rummaging over the Statute-books for materials and heads for a Digest. In the intervals of that employment, which will be many, I shall go on with my *Comment on the Commentaries*'.[18] 'Rummaging over the Statute-books', *i.e.* really finding out what the law was, he regarded as hack-work, quite easy, and secondary to his real interests.

As a result of this attitude his knowledge of law though extremely extensive was also peculiar. When he deals with 'Romanigenous' law it is refreshing to see him criticise an age-old text, the object of innumerable commentaries, as if it were the draft of a new bill, and if he calls it nonsense, it probably is. But it is disconcerting to find sometimes that there are—to say the least of it—gaps. I mentioned some in a lecture last year,[19] but there are others. In Section 17 in the *Comment,* for instance, which is headed 'Roman Law: how far consented to by the people?', he is concerned to get in a blow at Blackstone and incidentally at the 'chicanery of imperial sophists'. But he has not taken the trouble really to understand what Julian meant when he (if it was he) [20] based the validity of customary rules on the analogy with enactments of the popular assembly. And he did not look up the reference though Blackstone gave it to him.

[17] *Law and Opinion in England* (1905), p. 172.
[18] Everett, *op. cit.* (Note 12 above), p. 6.
[19] *Was Bentham a Lawyer?* (Keeton and Schwarzenberger (editors), *Jeremy Bentham and the Law,* 1948, p. 1 *et seq.*).
[20] D. 1, 3, 32, 1 is suspected of interpolation.

'I have not the passage in the Digest by me', says a note. Of course he might have verified it if he had prepared the work for publication himself, but his general practice makes this doubtful. Another amazing remark occurs in the *General Review of a Completed Code of Laws*.[21] 'What', he asks, 'is it to possess?' This appears a very simple question: there is none more difficult of resolution, and it is in vain that its solution is looked for in books of law: the difficulty has not even been perceived'. This was written, it is true, before Savigny's famous book on *Possession* appeared,[22] but even so it would have been impossible for any one well acquainted with Roman texts or commentaries on them, to say 'the difficulty has not even been perceived'. His knowledge of foreign law generally is, I think, often exaggerated by English writers, perhaps on the principle *omne ignotum pro magnifico*. It seems nearly all have been acquired *ad hoc* for work on which he was engaged, and thus corresponds to his chief interest in being largely procedural. Even as regards procedure, however, though his brilliant insight sometimes picks out significant points of distinction, *e.g.* between French and English ideas, he does not go very deep. When confronted with a difficulty, for instance, in the text of the *French Code of Civil Procedure*, he does not seek enlightenment from commentaries, but criticises from the point of view of the text alone.[23] Though I hesitate to say so, he was, I think, often superficial, and my hesitation is diminished by finding that Dr. Lipstein in his article on *Bentham, Foreign Law and Foreign Lawyers* says much the same thing, and gives a number of examples.[24]

Even in English law, and even late in life, he could make curious mistakes which had to be corrected by a *tiro* like J. S. Mill when he edited the *Rationale of Judicial Evidence*. He shared the popular fallacy that butchers could not sit as jurymen in capital cases,[25] and thought that no action could be brought by a father for the seduction of his daughter if she was over twenty-one.[26] Mill also had to correct his misunderstanding of

21 *Works*, Vol. 3, p. 188.
22 According to the editor's note (p. 157) Dumont edited this work in 1802. Savigny's *Recht des Besitzes* appeared in 1803.
23 *Op. cit.* (Note 19 above), p. 17.
24 *Op. cit.* (Note 19 above), pp. 202–221.
25 *Works*, Vol. 7, pp. 61 and 416.
26 *Works*, Vol. 7, p. 403.

what had been done by Lord Mansfield with respect to the amendment of the record in Wilkes' Case.[27]

The fact is that though he cared enormously for accuracy in argument he did not care much for it in matters of factual detail. This was due, no doubt, in part to a type of indolence which prevented him from looking up references and (more importantly) from preparing the bulk of his works for publication himself. But it was also due to that complete self-confidence which was part of his nature and led him to adopt a theory which reinforced his natural contempt for all authority. He was never impressed by authority from his earliest years, and his theory demands that no deference should be paid to it. Only argument which shows that a particular rule will on balance bring about an overplus of pleasure is for him valid at all. He insists on keeping the question What is the law? separated from the question What ought the law to be? and he is, in fact, only interested in the latter. Consequently he hated, above all things, the lawyer's habit of arguing that a rule cannot be law if it is bad, that in fact law is connected with justice.

As I tried to show in the lecture I delivered last year,[19] it is that refusal to follow authority of any sort, to begin anywhere except with the ultimately valid philosophical principle, that marks him out from lawyers far more than his actual abuse of them as a dishonest and self-seeking race.

I would thus disagree with Professor Julius Stone [28] when he calls Bentham ' a Trojan horse of reform within the gates of the chaotic, obsolete and unjust law of his time '. It is only in a minor sense that Bentham was within the gates of professional law. He was a member of the Bar, lived for a time in chambers, and even became a Bencher of Lincoln's Inn. But in a major sense his attack was an onslaught from outside, from a mind which was the antithesis of that ordinarily associated with the legal profession. Consider the nature both of his successes and of his failures. His successes are of two kinds—first the illuminating nature of his general principles which cut through the mass of traditional legal precepts, commonplaces and definitions, and secondly the concrete application of these principles to remove the anomalies and stupidities of the existing system. As

[27] *Works*, Vol. 7, p. 260.
[28] *Province and Function of Law* (1947), p. 268.

regards the first, it is enough to look at one or two of the best known examples, for instance his definition of a right, *i.e.* what we now call a 'subjective right'. Holland's *Jurisprudence* [29] gives a number of definitions from great jurists who lived before Bentham, *e.g.* from Zouche: 'A power for good in accordance with the rules of Justice'; from Pufendorf: 'That moral quality whereby we rightly command persons or hold things, or by the force of which something is owed to us'; from Leibnitz: 'A certain moral power'. Now I know there is more in these definitions than meets the eye, but I ask any non-lawyer to lay his hand on his heart and say how much wiser he is since reading them. Then I ask him to consider some of the corresponding remarks of Bentham, *e.g.* 'What you have a right to have me made to do (understand a political right) is that which I am liable, according to law, upon a requisition made on your behalf, to be *punished* for not doing'.[30] It may need a moment's reflection, but it can be understood as meaning something. It implies, of course, the whole theory that every subjective right is the product of objective law and that every rule of law is a command threatening punishment in case of disobedience. This conception has become so familiar to us that today teachers of jurisprudence spend a good deal of their time explaining what is wrong with it, but that should not induce them to overlook either its virtue of supreme clarity or its originality. Hobbes, it is true, had said something like it, but he had not said it nearly so clearly, and above all he had not proceeded to work out on the basis of these easily comprehensible ideas, a system which, by going into detail, was capable of forming a rival to the inherited classifications with which lawyers had struggled for ages. Or take his conception of liability for tort. He expresses, of course, the rationalist view that this must depend on fault. 'If you break my window there is no reason why you should pay for it unless you acted intentionally or negligently. If you were at fault in one of these ways, but only then, you should be punished, to teach you and people like you not to do it again. That could be done by putting you in prison, but it will be simpler to make you pay a fine, and give that fine to me, for in that way the further object of compensating me will be achieved. As Bentham put it

[29] 13th ed. (1924), p. 85.
[30] *Works*, Vol. 1, p. 292 n.

'the best fund whence satisfaction can be drawn is the property of the delinquent, since it then performs with superior convenience the functions both of satisfaction and of punishment'.[31] In that sentence alone a mass of confused argument is reduced to plain sense. But he goes on: 'But if the offender is without property, ought the injured party to remain without satisfaction? No, for satisfaction is almost as necessary as punishment. It ought to be furnished out of the public treasury, because it is an object of public good, and the security of all is interested in it'. In some particular cases we have now provided by compulsory insurance that compensation shall not fail because the delinquent is impecunious, but in these cases he is also not punished for his wrongdoing, at least so far as the law of tort is concerned. Progress in this branch of the law might have been faster if we had adopted Bentham's logical separation of the two questions of punishment and satisfaction. Be that, however, as it may—and it is far too complex to argue now—the principle he gives is clearly enunciated on the basis of his general theory, and is independent of inherited professional ideas.

In more immediately practical matters it is not different. Take the technical question of pleading. In the early nineteenth century there was a tendency to permit the general issue to be pleaded in a larger number of cases than before. Was this to continue, or was it to be checked? There were undoubtedly serious objections to it. If the defendant pleaded the general issue the plaintiff did not know which of a large number of possible defences he was really going to meet. The special issue, on the other hand, often involved the most appalling technicalities. The late Sir William Holdsworth could not justly be accused of 'leftist' tendencies, either in politics or in law, but this is what he writes: 'What Stephen and the other lawyers of his day did not see, and what perhaps they could not be expected to see, was that the defects of the general issue were small in comparison with the enormous risk that where the parties specially pleaded the case would be decided without reference to its merits . . . they had not realised the truth pointed out by Bentham that the extended permission to use the general issue given by the legislature, and the fact that litigants always availed

[31] *Principles of the Penal Code*, Cap. XVIII (*Theory of Legislation*, ed. Ogden, p. 317).

themselves of this permission, were so many recognitions that " the practice of special pleading was a nuisance " '.[32] What the lawyers ' could not be expected to see ', Bentham saw.

And what of his failures? His great failure is the failure of all purely rationalist theories of law. They leave out of account the emotional content which must be present in any sphere of knowledge so intimately connected with human life and human passions. Bentham attempted to treat law as an exact science, and indeed saw himself as the Newton of that science. The motives that actuate men could, he thought, be tabulated, weighed against each other, and used by an intelligent legislator in such a way as to induce each individual to do what the legislator considered would produce the greatest happiness of the greatest number. Attachment to tradition, the desire for what is conceived as justice, and the passion for revenge, he did not indeed ignore—he provided, for instance, for the last under ' pleasures of malevolence '—but he thought the legislator should be untouched by them, and he always looked upon himself as a legislator. Had he been humbler in mind, he would have seen that even the most far-sighted legislator has his limits, and might have conceived of himself in the role of a judge or even an advocate. He would then have seen that it is not always mere perversity that leads an advocate to plead or a judge to decide that a contract which has been made is ' no contract ' because it is unjust in the circumstances that it should be enforced. As Holdsworth says [33] he ' entirely ignored the fact that it is the work of lawyers which has made English law and Roman law great legal systems. He regards the activities of " Judge & Co. " as merely harmful, though he admits that in the past they had supplied good material '—and, if I may add a word, he fails to see that this admission shows how necessary in a changing civilisation will be further materials from the same source. History, except as furnishing illustrations, or more frequently warnings, he neglects. I have not been able to find out exactly how much he knew about the Historical School of Jurisprudence, but he certainly knew something, and expressed his contempt in his usual sarcastic vein. ' One way of making amends ' (*i.e.* for

[32] *History of English Law*, Vol. 9, p. 323, quoting Bentham, *Works*, Vol. 7, p. 326.

[33] *Bentham's Place in English Legal History*, 28 *California Law Review* (1940), pp. 568–586, at p. 577.

the difficulties placed in the way of legislation not proposed by ministers) . . . might be to set up and open an *Historical School à la mode d'Allemagne*: and instead of sending the schoolmaster abroad, send for a schoolmaster from abroad. Monsieur L'Herminier in France or Der Heer Savigny in Germany could furnish admirable masters. It is not every man that knows that by this school a *history of law* is spoken of, and with no small assurance, as a most advantageous substitute to law itself'.[34]

Further, even if an exact science of law is possible, Bentham had not the equipment for it, for, as Sir Leslie Stephen pointed out,[35] he was lamentably deficient in psychology and sociology. There was little enough of the former to know in his day, but Bentham's psychology seems to have been evolved out of his inner consciousness uncorrected by the experience which practice would have given him.[36] As regards sociology, what Stephen had in mind is that Bentham placed himself in the position of a legislator in a society where the rule of law is already established, and ignored the problem of making the society cohere sufficiently to establish it. No doubt Bentham would have replied that he knew that quite well: he had defined carefully what he meant by political society and took that as his starting point. But the fact remains that in real life the problems of law and law-abidingness cannot so easily be separated.

Another defect which might have been corrected by practical experience is the over-elaboration of detail. No one who attempts to read Bentham's later works can help being appalled by the mass of detail that they contain. It is so minute that it obscures the argument and shows a lack of the sense of proportion—a failure to distinguish between the essential and inessential. Professor Woodward [37] says that Bentham 'was not interested in the problems of life but in the mechanism of living', and that 'his reforms were a series of political gadgets'. So far as law is concerned I think this unfair, for in innumerable cases he went straight to the root of the matter. But he does pay undue attention to gadgets. 'Manifold writing', for instance, an early

[34] *Works*, Vol. 4, p. 425.
[35] *English Utilitarians*, Vol. 1, p. 269.
[36] See however C. K. Ogden's Introduction to *Bentham's Theory of Fictions* for psychology as applied to language.
[37] *Op. cit.* (Note 7 above), p. 34. Dicey, on the other hand, while recognising his weaknesses, speaks with admiration of his inventiveness, *Law and Opinion*, pp. 129–130.

forerunner of carbon paper, is mentioned in several places,[38] and is specifically prescribed for use by the Prime Minister and in the Departments by the *Constitutional Code*.[39] This particular gadget, though out of place, is in itself no doubt sensible enough; carbon paper *is* useful. But some of the detail is absurd or even grotesque. Miss Margery Fry, in her article on *Bentham and English Penal Reform*,[40] gives one example which I cannot refrain from quoting. Outside the 'labour houses', in order to inspire awe, was to be a painting or bas-relief representing a wolf and a fox yoked to a heavy cart and a driver whipping them. In the background might be a troop of wolves ravaging a flock of sheep, and a fox watching a hen-roost. A motto might be added, *e.g.* 'Violence and knavery are the roads to slavery'. (This must be one of the very few cases in which Bentham dropped into poetry.) Finally, 'if these bas-reliefs were made in artificial stone, one mould would suffice to cast one for every labour-house'. As Miss Fry says, 'his fairy godmother, though bestowing on him some humour, did not add an acute perception of the absurd'.

But *his* absurdities are easy for ordinary people with more experience of life to see and correct; what ordinary people did not see until he pointed it out to them was that there were too many absurdities and cruelties in the actual administration of the law, and that it was perfectly possible to remove them if enough intelligence was used. Academic persons at any rate ought to forgive a great deal to a man who showed how much a theory followed consistently and courageously could do, and we at University College, London, have particular reason to be grateful to him. He was indeed too old to take much part in its actual foundation, but his theories and his lifelong campaign against privilege led others to take the matter in hand, and the new university was probably in his thoughts a good deal. Among his papers, dated September–November 1828, just when the university was opening, is a dialogue entitled 'Blackstone, a Dream'[41]—how Blackstone haunted the old man still! Characters, in addition to Blackstone, are Astræa (goddess of

[38] For a description see *Works*, Vol. 5, p. 406 n.
[39] *Works*, Vol. 9, p. 209.
[40] *Op. cit.* (Note 19 above), pp. 20–57.
[41] University College, London, MSS., Portfolio 31. Described, Halévy, *La formation du radicalisme philosophique*, Vol. 1, p. 303.

justice), Felicia (representing utility), Gubernia (law as it is) and Dolosa (who explains what law is not, but pretends to be). It begins 'Methought I was in the Lecture Room of the London University. The forms were filled with scholars. . . '. He would have been glad, I think, that one of many lecture rooms in that same university was again filled with scholars in honour of the two hundredth anniversary of his birthday.

2

LEGAL RESPONSIBILITY FOR POLITICAL ACTS[1]

G. W. Keeton

The trial, condemnation and execution of the Bulgarian statesman, M. Petkov, has focussed attention throughout the world upon a problem, the solution of which raises very fundamental questions indeed, both for politicians and for lawyers. It is, perhaps, the most important legal problem of the present time.

M. Petkov was arraigned, not for breaches of the positive law of Bulgaria, but for the formulation and execution of political policies with which his opponents were in complete disagreement. The difference between M. Petkov and his opponents, however, was that his opponents dominated the government of Bulgaria, where under the political philosophy which at present prevails, the primary function of the judiciary is to ensure the safety of the State, as interpreted by the dominating political party. As the British note to the Bulgarian Government, following M. Petkov's execution, put it:

'The Bulgarian Government have been left in no doubt that His Majesty's Government and the people of the United Kingdom have been profoundly shocked by the proceedings against Nikola Petkov, which they regard not as a genuine trial by due process of law, but as an attack upon an individual on account of his political opinions. The trial was in fact one more manœuvre in the general campaign on which the present Bulgarian Government appear to have embarked to establish a regime controlled by a single minority party and to stifle all those who hold other views. . . .

'The accusation against (Petkov) was that he had incited military conspiracies against the present Bulgarian regime. The evidence introduced in Court was clearly insufficient to sustain a conviction. The three judges of the Court and the two State

[1] In the following paper only extraordinary legal procedure is considered. Treason and sedition are legal problems which require separate treatment.

prosecutors were members of the Communist Party; and the prosecution speeches were political attacks on Petkov and amounted to nothing more than that he had opposed the Government. Three of the lawyers selected by Petkov to undertake his defence were immediately arrested and were not released until it was technically impossible for them to take part in the trial. Even then every obstacle was put in Petkov's way to prevent him from consulting his counsel. A full deposition presented by Petkov was not accepted by the State prosecutor'.

The Note goes on to specify instances of political pressure brought to bear on witnesses, and it draws attention to the one-sided publicity campaign which accompanied the trial. It concludes:

'In the opinion of His Majesty's Government, Petkov died for the cause for which he had always fought—the right of men to hold and express according to their personal consciences their own political convictions. His execution is yet another example of the use of judicial murder to get rid of people who do not agree with their Government, a procedure which is not compatible with democracy'.

To condemn M. Petkov for conduct which, from first to last, amounted to no more than political opposition was, in the opinion of many critics, simply to dress up political revenge in the trappings of justice. Exactly the same criticisms were lodged, for the same reasons, against the trial of Professor Furlan in Yugoslavia. Nor do these trials stand alone. *The Times* newspaper of November 8, 1947 gave a list of trials for political activity in Eastern Europe during the first ten months of 1947. From this list it appears that charges have become vaguer, and the number of persons charged has increased sharply as the year progressed. There have been many more since this list was compiled.

On the other hand, Major Lyall Wilkes, M.P., writing in *The Times* newspaper of September 4, 1947 pointed out that the administration of 'political justice' was by no means confined to the eastern side of what is called 'the Iron Curtain'. He stated that in Greece over 400 people at least had recently been executed under emergency decrees, and that many of them had as fine resistance records as M. Petkov. He added also that many of them were certainly not Communists. Even if they had

been, the sentences could not be justified, unless (it should be added) they were convicted of acts treasonable to the Greek state.

This, however, is by no means the full extent of the problem as it exists outside Russia at the present day. It is not within the scope of this paper to say anything upon the Nuremburg Trial, except to notice in passing that one of the main charges against the Nazi leaders was that they had planned and waged wars of aggression, and that the case against them on this charge was prepared (mainly by the Americans) on an extremely elaborate scale. It became, in fact, a survey of German history from 1930 onwards, and it stretched sufficiently far to sustain accusations against Dr. Schacht for the economic planning which he undertook whilst the Nazis were in control in Germany. Such a conspiracy, as described, is exceedingly comprehensive. It might well involve persons of many other nationalities. It might involve, perhaps, Englishmen, Frenchmen, Dutchmen, or even Americans, in positions of responsibility, who saw in the Nazi regime in Germany a buffer against the U.S.S.R. It might, perhaps, include Russians who actively prepared and executed the pact with the Nazis in the summer of 1939. Clearly, even in the sphere of international law, the trial has raised far more problems than it has solved.[2] Even if attention is confined to municipal law, however, one might notice that in many of the European countries which were occupied by Germany during the recent war there have been trials of statesmen and others, not only for collaboration with the Germans during the occupation —that is an offence for which the criminal law of all states provides—but also for policies pursued prior to the war which, in the opinion of those who came to power when the war was over, fell short, in various respects of some imagined standard of patriotic duty. . The trial of Marshal Petain is particularly fruitful in examples of this type of charge. Even when due allowance has been made for a liberal interpretation of municipal laws relating to treason, sedition, and conspiracy, there remains an important residuum of charges, and of evidence in support, and of convictions, for what can only be described as the crime of dissidence from the political creed of those who possessed authority at the end of the war.

[2] See G. Schwarzenberger, *The Judgment of Nuremburg*, 2 *Year Book of World Affairs*, 1948, p. 94 *et seq.*

In a letter to *The Times* newspaper of September 8, 1947 Mr. E. G. M. Fletcher, M.P., quoted the observation of the Czechoslovak Minister of Education: 'To dispose of a political opponent on the scaffold is undemocratic whether in the Iberian Peninsula or the Balkans'. But did not the Nuremburg Tribunal dispose of political opponents on the scaffold? Yet the Czechoslovak Government was a party to the proceedings there, and concurred in the conviction, not only for war crimes in the strict sense, but also for preparing and waging aggressive war, in the course of which Czechoslovakia was one of the first victims. What is the solution of these apparent paradoxes? Do civilised men at present wander in a mass of conflicting political policies which, if unsuccessful, bring death to those who attempt to put them into operation, or are there somewhere criteria which permit us to condemn the trial of M. Petkov as 'unjust' and to approve the political trials in Greece, the Nuremburg Trial, and the de-nazification trials in Germany and Austria, as 'just'? Are these criteria, if they exist, legal, political, or ethical? How are they established?

It is easier to pose these questions than to answer them, but English constitutional history affords us valuable assistance in answering them, for the problems with which we are faced on a world scale today have a long and turbulent history in this country.

One great chapter of English constitutional history records the struggle between Crown and Parliament for the control of the executive. During the course of that struggle two procedures for the control of political acts by high officials were elaborated—impeachment and acts of attainder. Historically, they were used for different purposes, though it would seem that such differentiation is not inherent in the nature of the remedies. Impeachment was the weapon fashioned and employed by Parliament to secure punishment for grave abuses committed by men who were in reality, as well as in name, the King's servants. Acts of attainder, on the other hand, were employed by the Tudors, and particularly by Henry VIII, to get rid of ministers who obstructed the royal will, although such acts had also been used during the Wars of the Roses to bring about the destruction of political opponents, and they were used again in the eighteenth century against the Jacobites.[3] It was, moreover, by act of

[3] See Maitland, *Constitutional History*, pp. 246, 317–318.

attainder that Strafford, the great minister of Charles I, perished in 1641, and a similar procedure was employed against Archbishop Laud in 1645, although on this occasion the Royal Assent was not given, because of the existence of the Civil War. An act of attainder affords the most striking example known to English law of the omnipotence of Parliament. It is, in fact, homicide by statute, for Cromwell, Henry VIII's Chancellor, obtained an opinion from the judges that Parliament might properly proceed to pass such an Act without preliminary judicial proceedings. Ironically, Cromwell himself was one of the first persons to lose his life in this way.[4]

Surveying the occasions on which acts of attainder have been used to destroy public men, it may be said that they can be divided into three distinct classes: (1) Acts of political revenge *e.g.* of Lancastrians against Yorkists, or of Yorkists against Lancastrians, or of Parliamentarians against the ministers of Charles I; (2) Acts of royal despotism. These are confined to the reign of Henry VIII;[5] (3) Acts of political expediency *e.g.* the acts of attainder against the Jacobites, the procedure here being employed because of the unsettled state of the country, and the uncertainty of securing a conviction for treason from a jury. All three classes of case may therefore be regarded as abnormal, and the first two have the character of political persecution. Moreover, all acts of attainder are examples of the legislative process. They have neither the form nor the substance of judicial procedure, and their revival in modern times could only be imagined during or at the close of a civil war.

Impeachment, however, has a longer history, and raises more difficult problems. The first clear example occurs in 1376, the last in 1805. Between these dates, impeachments were in no sense continuous. They occur in waves, the first being in the closing years of the reign of Edward III, and during the reign of his grandson and successor, with a few in Lancastrian times, the last being that of the Duke of Suffolk in 1449. Thereafter,

[4] Taswell-Langmead, *Constitutional History* (10th ed. Plucknett), pp. 261–262.

[5] Cf. Taswell-Langmead, *op. cit.*, p. 320: 'The act of attainder asserted the same irresponsible despotism over the individual as the acts of suppression had done over ecclesiastical corporations, and both of them denied the profoundest conviction of the middle ages, namely, that the liberty of the subject rested upon the inviolability of his person and his property within the limits of due process of law'.

there is an interval until 1621, when Mitchell, Mompesson, Bacon and others were impeached, to be followed by the impeachment of the Lord High Treasurer, the Earl of Middlesex, in 1624; by that of Buckingham in 1626; and by that of Dr. Mannering in 1628. Once again there is an interval, until the meeting of the Long Parliament in 1640. In the first two years of its existence there was a fresh crop—the largest in any single period in English history. There were several others between the Restoration and the accession of William III; and a few additional cases occurred in 1715, the accused being Jacobites implicated in the Rebellion of the Old Pretender. In 1746 Lord Lovat was impeached for high treason. Thereafter, impeachment tends to fall into disuse, the last two cases being those of Warren Hastings, at the end of the eighteenth century—a case which dragged on for seven years, before the great Indian administrator was acquitted; and finally, that of Lord Melville in 1805. Thereafter, impeachments have ceased to be brought in England, though there have been occasional hints that they might be revived.

For what may a person be impeached? The trials show that either a peer or a commoner may be impeached for high treason, for felonies, and for high political misdemeanours.[6] The latter is an elastic term which has never been defined. Thus, Dr. Roger Mainwaring, was impeached in 1628 for three political sermons (two of which had been preached before the King), which had been published under the title of ' Religion and Allegiance '. The trend of these sermons was to exalt the royal authority, and to maintain that those who refused to pay taxes imposed by royal command and without parliamentary authority, offended against the Law of God and the King's Prerogative, and were guilty of impiety and rebellion. For these adventurous views Dr. Mainwaring was condemned by the Lords to imprisonment during the pleasure of the House, to pay a fine of £1,000, to be suspended for three years from the ministry, and to be incapable of holding any ecclesiastical or civil office. However, the King pardoned him forthwith, and subsequently he was appointed Bishop of St. Davids.[7] Even charges of high treason, however, were often

[6] Anson, *Constitutional Law*, 5th ed., Vol. 1, pp. 384–388; Ridges, *Constitutional Law* (ed. Keith), pp. 215–217.
[7] Taswell-Langmead, *op. cit.*, pp. 591–592.

little more than cloaks for political attacks. Thus, although twenty-eight articles were exhibited against Strafford, when impeached for high treason in 1640, they proved so flimsy that it early became apparent that the impeachment would fail. It was accordingly dropped, and Strafford forfeited his life under an even more arbitrary act of attainder.[8] The charges against Laud, who was impeached in 1641, were still more remote from the legal conception of treason, even as judicially extended, and once again the judicial proceedings were abandoned in favour of an act of attainder.[9]

The incidence of impeachments is extremely interesting. The evolution of the process in the last years of Edward III's long reign was the product of a popular movement (which enjoyed the sympathy of the Black Prince) to free the old King from the corrupt advisers and favourites who surrounded him. In 1376, the 'Good Parliament' which met for the first time in that year, impeached two peers, Latimer and Nevill, and four commoners, who were farmers of customs and of various monopolies. There were many charges in the impeachment, but the three principal ones are interesting. They were (1) that the accused had advised and procured the removal of the Staple from Calais, contrary to statute; (2) that they had lent money to the King at excessive rates of interest; (3) that they had bought up cheaply old debts due from the Crown, and had subsequently paid themselves in full from the Royal Treasury. The accused were in due course found guilty after a full consideration of the charges and the defences offered, the principal punishment inflicted being imprisonment for varying periods. Thus, on the occasion of the first use of this powerful constitutional weapon, we find that it is employed essentially for political, rather than for legal shortcomings, and this impression is confirmed by a perusal of the political history of the period. Both Stubbs and Taswell-Langmead in their *Constitutional Histories*[10] emphasise the fact that the impeachments were in reality the opening and most important moves in a political campaign, the object of which was to destroy the monopoly of administration which had been secured by John of Gaunt, Duke of Lancaster, during the illness

[8] *Ibid.*, pp. 592–593.
[9] *Ibid.*, p. 593.
[10] Stubbs, *Constitutional History*, Vol. 2, pp. 430–434; Taswell-Langmead, *op. cit.*, pp. 184–185.

of the Black Prince and the dotage of Edward III. Thus, at a period long before responsible government was evolved, there was introduced into the English constitution the principle of legal responsibility for political acts, which could be invoked at any time by a party which came to power on a wave of popular enthusiasm, which a newly-elected Parliament in times of political stress will normally reflect. This lesson was driven home during the reigns of Edward III's successors. Richard II attempted to rule in defiance of popular opinion, as expressed in Parliament, and his ministers paid the penalty. Thus, in 1386, the Commons impeached Michael de la Pole, Earl of Suffolk, and Lord Chancellor, and procured his removal from office, coupled with a fine and imprisonment.[11]

So far, impeachment, though judicial in form, appears rather as a move in a political campaign than as a genuinely judicial proceeding. If a minister carries out the King's policy in defiance of the prevailing sentiment in Parliament, he will be accused, forced from office, and compelled to pay a fine for his temerity. The actual charges do not appear to be taken too seriously, and are regarded rather as pegs upon which to hang political attacks. This character was never entirely lost. Indeed, it reappears in the fullest and most complete form in the trial of Warren Hastings at the end of the eighteenth century, when the leaders of the parliamentary attack upon him, and especially Burke, Fox and Sheridan, used the flimsiest charges of corruption as a pretext for attacking the entire achievement of Hastings in India, as well as the system under which India was governed, and the English ministries under whom that system had grown up. So employed, impeachment appears as the extreme weapon of a victorious faction, used against an administration whom it regards as having governed oppressively. 'Oppressively', however, is a term which is incapable of exact definition, at any rate in such a context. Modern historians agree that the long ministry of Walpole, at the beginning of the eighteenth century, was the period in which political toleration first took deep root, and in which Government learned to make its existence as unobtrusive as possible. Yet when Walpole was at length driven from office in 1742, there was a very real possibility that he would be

[11] Taswell-Langmead, *op. cit.*, pp. 190–191; Stubbs, *op. cit.*, Vol. 2, pp. 474–475.

impeached. Indeed, his biographer suggests that he spent considerable sums of money in bribes to avoid it.[12] In the end all thoughts of impeachment were abandoned, and this, as much as anything, proved the decisive moment in modern English constitutional history. Had Walpole been successfully impeached, it is possible that, notwithstanding the evolution of theories of ministerial responsibility to Parliament, every Prime Minister, on defeat in the House, would have run the risk of impeachment, especially if issues of any moment had been decided during his tenure of office. Yet the abandonment of this weapon is most strikingly illustrated by the failure to impeach Lord North for the loss of the American Colonies, more especially as Lord North approximated more closely to the position of King's instrument (and as such is comparable with Michael de la Pole, the first Duke of Buckingham and the Earl of Strafford) than any other Prime Minister since the Revolution of 1688. It is by no means without significance that the American Colonies, after the close of the War of Independence, retained impeachment as a part of their constitutional machinery. Even today, it is a weapon which may be used against an unpopular or inept State Governor, and it has more than once been threatened against a President himself. It was a very real possibility against Lincoln's successor, General Ulysses Grant, whose desire to benefit his friends at the charge of the nation sometimes outran his discretion.[13]

Whilst the first cases of impeachment were intended to establish the constitutional principle that the Ministers of the Crown must answer to Parliament for their policy, a second group of impeachments in the reign of Richard II pointed ominously to possible future developments. In 1397 Richard made a strong attempt to destroy the fetters which his barons had

[12] John (Viscount) Morley, *Life of Walpole* (Twelve English Statesmen Series).

[13] J. L. De Lolme in his essay on *The Constitution of England* describes impeachment as 'an admirable expedient, which, by removing and punishing corrupt ministers, affords an immediate remedy for the evils of the State, and strongly marks out the bounds within which power ought to be confined; which takes away the scandal of guilt and authority united, and calms the people by a great and awful act of justice: an expedient, in this respect especially, so highly useful, that it is to the want of the like that Machiavel attributes the "ruin of his republic"' (ed. Hallam, p. 181). But American experience has been no happier than our own.

placed upon him, and he secured the return of a House of Commons subservient to his wishes. Forthwith, the newly-returned Parliament impeached the leaders of the baronial opposition. These included the Archbishop of Canterbury; the King's uncle, the Duke of Gloucester; and the Earl of Arundel. Of these, the Archbishop was banished, Arundel was condemned and beheaded, and the Duke of Gloucester was found murdered at Calais before the charges against him could be investigated. In spite of this a sentence against him was recorded.[14] Thus, in the space of ten years, the Commons had impeached the chief instruments of royal despotism, and then, at the behest of a temporarily triumphant King, had proceeded to destroy the chief authors of the limitations upon the royal authority. The lesson is thus made terribly clear that, if once constitutional restraints are thrown aside, the inevitable swing of the political pendulum will in turn destroy the leaders of both parties. During the faction fights between the Houses of York and Lancaster, these consequences followed inevitably upon a temporary change of dynasty. However, by this time, the protagonists had tired even of the forms of judicial process. So, after the impeachment of the Duke of Suffolk, Michael de la Pole's grandson, in 1449, impeachment was abandoned for the more summary act of attainder. Once again the monarchy learned the lesson which this change implied, and the Tudor despots relied upon the act of attainder, permitting impeachment to lapse for 171 years—a period longer than that which has elapsed since the impeachment of Lord Melville in 1805.

With the exception of the impeachment of the Jacobite lords in 1715 and 1746, and of the impeachments of Warren Hastings and Lord Melville, every impeachment of a great political figure since the revival of this constitutional device in 1621 had been intended to bring home to the Ministers of the Crown the lesson of ministerial responsibility to Parliament. Since 1714, as we have seen, no impeachment on this ground has been preferred, the reason usually given being that since the accession of the Hanoverians, this lesson has been finally learned. Thus, Maitland, writing in the far-off days of the nineteenth century, says: 'It seems highly improbable that recourse will again be had to this ancient weapon unless we have a time of revolution before

[14] Taswell-Langmead, *op. cit.*, pp. 196–197; Stubbs, Vol. 2, pp. 495–496.

us. If a statesman has really committed a crime then he can be tried like any other criminal; if he has been guilty of some misdoing that is not a crime, it seems far better that it should go unpunished than that new law should be invented for the occasion, and that by a tribunal of politicians and partisans; for such misdoings disgrace and loss of office are nowadays sufficient punishments'.[15]

This is, however, the political philosophy of a settled and progressive age, and it is noteworthy that Maitland, with characteristic caution, excepts a period of revolution.

There is great wisdom in this exception, for the hypothesis that impeachment has fallen into disuse because of ministerial responsibility for political acts to Parliament seems inadequate as an explanation; otherwise, impeachment would have been used to curb the increasing extra-parliamentary power of the Cabinet, or to punish a minister such as Lord North, who was only maintained in office by constant royal pressure, and whose policy in North America was repudiated and denounced by most of the great statesmen of the day. The real explanation for the disuse of impeachment is to be found in the Revolution Settlement of 1688, and it is well exemplified in the political discussions which accompanied the fall of Walpole in 1742. Articles of impeachment were prepared but were not proceeded with. A bill of pains and penalties was next drawn up, but it was abandoned because it was realised that there was no chance that it would pass the House of Lords. Finally, the incoming Ministry appointed a secret committee to examine into the last ten years of Walpole's administration, but it failed to report anything of substance. One after another the possible punitive measures had broken down, and the reason may perhaps be found in a significant paragraph in John Morley's biography:[16] When Walpole went to the levee, the King (says Morley), 'could not conceal his delight at seeing again the friend and author of so many good counsels, and the new ministers were in agony lest the King should call him into the closet. They all, however, kept that fair countenance which often among political men hides such dismal emotions. They came and spoke to him, and he had a long and jovial talk with Chesterfield. Nobody seemed to bear

[15] *Constitutional History*, p. 477.
[16] P. 246.

anybody else malice. The Duke of Newcastle gave his colleagues a dinner one Sunday at Claremont; the servants got drunk and the coachman tumbled off the box on the way back. They were not far from Richmond, and the innkeeper told them that perhaps Lord Orford would lend them his coachman. So Walpole's coachman drove Pulteney, Carteret, and Limerick home. Carteret at a levee came up to thank him, the Duke of Newcastle standing by. " Oh, my lord," said Walpole, " whenever the duke is near overturning you, you have nothing to do but to send for me, and I'll save you " '.

Newcastle, Chesterfield, Pulteney, Carteret and Limerick were all Whigs, as Walpole himself was, but they were the leaders of the coalition that overthrew him. The Revolution of 1688 had decided that the Whigs were to enjoy a monopoly of government for the next eighty years. Politics were therefore reduced to a game of manœuvre between rival Whig groups. A group might be in office today, and in opposition tomorrow. Selected as they were from a single small class, there were clear limits to the action which they could initiate against one another. Further, the Revolution of 1688 had established a parliamentary settlement which lasted in all essentials until the middle of the nineteenth century. Constitutional principles were no longer in dispute, but merely particular aspects of political action. On these, there might be many possible variations of opinion, but they were not matters for which gentlemen could lose life, fortune or reputation. Warren Hastings, however, was impeached for a major constitutional principle. His trial was a clumsy method of making the Government of India subservient to Parliament, and it is therefore in line with the great impeachments of the seventeenth century. The last impeachment of all, that of Lord Melville in 1805, was on the other hand simply for maladministration whilst a Minister of the Crown. As such, it was something of an anachronism, and was ineffective Melville was a personal friend of the Younger Pitt, then Prime Minister, and the decision to impeach was made upon the Speaker's casting vote. Melville was eventually acquitted, and the verdict of history seems to be that the proceedings were misconceived, and that they were in reality a veiled political attack upon Pitt himself. At any rate, Pitt felt the attack very deeply. ' Some have ascribed his death to Ulm ', says Lord Rosebery,[17]

[17] *Life of Pitt*, p. 251.

' and some to Austerlitz; but if the mortal wound was triple, the first stab was the fall of Dundas'. Of the impeachments of Warren Hastings and Melville, May says: ' The former was not a minister of the Crown, and he was accused of offences committed beyond the reach of parliamentary control; and the offences charged against the latter had no relation to his political duties as a responsible minister'.[18]

The Revolution of 1688 established in these islands the liberal state founded on political toleration. Its lifeblood has been the acceptance of certain fundamental principles underlying our political organisation, the ' agreement to differ' together with the acceptance of a clear delimitation between the spheres of private and State action. There is no warrant in English constitutional history, at any stage of our political development, for the tolerance of intolerance, whether the intolerance was that of militant Catholicism or that of advocates of arbitrary power. It was only when the lesson had been learned at the cost of long and bitter struggles and great loss of life, that milder habits became possible. This dates from the fall of Walpole—the time when England's long commercial and maritime supremacy were becoming firmly established. It was natural for the constitutional historians of the late nineteenth century to assume that these social conditions would continue indefinitely. Instead, our commercial supremacy has gone, our colonial empire is going, and for the first time since the Revolution of 1688, political doctrines based on intolerance of opposing views are being industriously propagated. These are new conditions, giving rise to political problems different in nature from those which have existed during the past two centuries. Nor is this all. The progressive abandonment of extraordinary judicial methods of coercion for political acts was, as we have seen, made possible by the acceptance of the conception of the liberal state, with its comparatively few points of contact with the individual. Today, the liberal state is passing away, in favour of a planned society. This is not the place to consider whether, in spite of emphatic assertions to the contrary, anything more than the empty shell of liberty can exist in a planned society, but it is already apparent that the responsibility of government for policies affecting every aspect of individual activity is higher in a planned society than it was in a liberal State.

[18] *Constitutional History,* Vol. 2, p. 93.

The increased responsibilities which have been assumed by servants of the Crown in recent years may have in the future important implications in the sphere of constitutional law. We have seen how the extraordinary remedies of the constitution fell into disuse when government became restricted to a choice of alternative courses of action within an agreed political and social framework. That framework today is passing away. It has been in course of liquidation during the past half century. Today, in Great Britain, there is more disagreement over the bases of political action than there has been for two and a half centuries. This may involve a heavier degree of ultimate responsibility for mistakes which may involve any one or every one of us in ruin. This does not inevitably follow, and it may not be desirable, but so long as human nature—even British human nature—remains what it is, it is at any rate a possibility which cannot be completely discarded.

It will now be evident where this discussion has led us. It began with a condemnation of some recent events in Eastern Europe. That condemnation was based upon the application of certain legal standards which are themselves the product of a fully developed liberal civilisation. We ourselves have not always applied them in the past. Indeed, we have only fully applied them in relation to political acts since 1714. But it is also only since 1714 that the problem of abuse of power in England has ceased to be of practical importance. It is regrettably possible that we may not always apply those standards in the future, however much it may be desirable to do so. The lesson of experience is clear. Once an attempt is made to impose legal responsibility for political acts, it progressively degenerates into an abuse of legal procedure for political ends. The trial and execution of M. Petkov is precisely similar in quality to the trial and execution of the baronial opponents of Richard II in 1397. In each case those who have been condemned were the victims of an intolerant political creed. Exactly the same judgment can be passed upon the execution of Strafford and Laud, although in their cases the executions were the consequences of acts of attainder, after the impeachments had been discontinued. The issue in these trials was not whether public servants had been guilty of abuse of power, but simply whether they were the leaders of a hated opposition or not. So we can place what is

taking place in Eastern Europe today in its proper context. Whether, however, even in this country it will be possible to preserve the quality of political tolerance indefinitely under adverse conditions is a matter which calls for serious thought and unremitting effort.

3

THE FRONTIERS OF THE COMMON LAW

R. H. Graveson

Those among you who are members of Lincoln's Inn, and, I hope, many of you who are not members, may have seen in the Hall of that Inn the remarkable fresco by Watts depicting the world's great lawmakers. If it were incumbent upon me this evening to give you a text on which to base my remarks, I would choose the resounding words used by Sir Frederick Pollock in describing that fresco to students. 'There', he said,[1] 'you shall see in very truth how the spark, fostered in our own land by Glanvil and Bracton, waxed into a clear flame under the care of Brian and Choke, Littleton and Fortescue, was tended by Coke and Hale, and was made a light to shine round the world by Holt and Mansfield, and the Scotts, and others whom living men remember. You shall understand how great an inheritage is the law of England, whereof we and our brethren across the ocean are partakers, and you shall deem treaties and covenants a feeble bond in comparison of it; and you shall know with certain assurance that, however arduous has been your pilgrimage, the achievement is a full answer'.

I should like to consider the common law not only in the sense of its territorial expansion which Pollock used. I wish also to say a word about its legal frontiers, the internal frontiers with other branches of English law; about its international frontiers and its psychological frontiers. For all these frontiers mark the boundaries of the common law today. Whether these limitations which shape the pattern of our law and of our life shall be strengthened or surmounted, and whether they will be turned into opportunities for further progress, rests in no small measure in your hands. But before turning to consider them, it would be well to state briefly what one may understand by the common law itself. We all know that it is the body of law founded on the

[1] *Oxford Lectures & Discourses* (1890), p. 111, cited by Holdsworth, *Essays in Law and History*, p. 235.

customs of the country as discovered and applied by the itinerant justices of Henry II and his successors, and administered until 1875 in the old Courts of Common Law. We all know that it embodied by extension and interpretation a number of early statutes, such as Magna Carta. But all that represents merely the formal content of rules of the common law. In the growth of that system many of those rules have become obsolete, many have changed, many have been replaced to satisfy the needs of a progressive civilisation. But the common law is more than a body of living and changing rules: it is a system of law based on fundamental principles which have changed little throughout the centuries. They are principles which endure because they respond to something deep and enduring in the hearts of men. The greatest of these has been the freedom of justice from political and administrative control, the fact that common law judges hold office and exercise their functions without fear of control or censure by the government and are answerable only to the High Court of Parliament itself. This in its turn has contributed greatly to that other major characteristic of the common law, the sense of individual liberty of speech, thought and action protected from arbitrary infringement by an independent and ever-watchful judiciary which alone had the power to try and to punish. These principles, in nature political and constitutional, are of the very essence of the common law. They are supplemented by other and less important characteristics, not all of them indigenous but all formed in or moulded to an English pattern, such as trial by jury, the accusatorial nature of procedure, the empirical nature of precedent, the inductive method of judicial reasoning and the age-long tradition of teaching, all of which help to identify this unique system.

Because the common law was more than a body of rules which governed Englishmen, because it embodied their way of life, it went with them wherever they went. To say it did so because it was the only system they knew would be less than truth and do them less than justice, for English lawyers have, from the time of Bracton, been in continuous contact, through commerce and the exchange of cultural ideas, with the legal systems of Western Europe,[2] and through this interchange of

[2] Professor Hazeltine's Preface to Pound, *Interpretations of Legal History*, pp. x, xi.

ideas which, in the words of Professor Hazeltine, 'knows no frontiers of land and sea'[3] principles and concepts of the common law and the civil law have found their way into each other's systems. But Roman law was never wholly received in England after the Renaissance for two main reasons. In the first place, it would have reversed the traditional constitutional position of the individual in relation to the State: and Englishmen preferred to live, in the words of Bracton, 'under God and the law' rather than under the despotic maxim of civil law, 'quod principi placuit habet legis vigorem'. Secondly, the rejection by Henry VIII of the supreme spiritual power of the Pope reduced the functions and influence in England of the body of men who would most have welcomed the reception of a legal system on which their own canon law was based. It is significant that Cardinal Wolsey was the last of the line of great ecclesiastical Chancellors.

There was in the days of colonisation in the sixteenth and seventeenth centuries an acute consciousness that the common law, which bound the King no less than his most humble subject, was a shield against arbitrariness and oppression to go with and protect the Englishman wherever his steps might lead him. On this conception was built the body of constitutional law, of which the main principles were affirmed by Chief Justice Holt in *Blankard* v. *Galdy*[4] and restated by Lord Mansfield in *Campbell* v. *Hall*,[5] declaring that colonisers took with them so much of the English common law as was appropriate to their new situation, and that a conquered territory should retain its own laws until they were changed by constitutional means. Lord Macmillan has drawn attention to a unique and interesting precedent in the case of the Orkney and Shetland Islands for the application of the principles of conquest to the acquisition of territory by the foreclosure of a mortgage.[6] The Islands had been pledged to James III of Scotland as security for payment of a dowry by the father of his bride-to-be, a Scandinavian princess. As the dowry was never paid in full, the Islands passed to the Scottish Crown; but they retained their native law, that

[3] Professor Hazeltine's Preface to Pound, *Interpretations of Legal History*, pp. x, xi.
[4] (1693), 2 Salk. 411.
[5] (1774), Cowp. 204.
[6] See Vol. 27, *Journal of the Society of Comparative Legislation* (1945), p. xxiii.

of Norway. Still, he would be rash indeed who tried today to deny to the Islanders any one of the constitutional common law rights of the Englishman. It is noteworthy that the years of colonial expansion and conquest followed, for the most part, the age of Coke; and the common law which was exported in this way was the common law of Coke's Institutes rather than the strict and unadulterated common law of England. From Coke's political struggles to maintain against the Crown the supremacy of Parliament, the independence of the judiciary and the liberty of the individual came a strong and authoritative, if biassed, interpretation of the common law which suited well the self-reliant colonisers of his age. The accordance of Coke's views, moreover, with the individualistic religious beliefs of the Puritans, who took their legal system to New England at the beginning of the seventeenth century, enabled a foundation of common law to be laid in America which, despite its English ancestry, survived the War of Independence, found new expression in the Constitution and, by providing a concrete and workable basis for eighteenth century rationalism and nineteenth century natural law, carried forward its frontiers in the last century across the American Continent. For the nineteenth century pioneers, no less than the colonisers of former years, regarded the traditions of the common law, to use Mr. Justice Story's phrase, as 'a part of their birthright'. In the formative period of American law the natural rights of man and the common law rights of the American were largely synonymous.

These fundamental constitutional aspects of the common law, its constant principles as distinct from its changing content, have permeated systems based on civil law even where, under the doctrine of conquest or cession, a country has retained the Romanesque system it enjoyed before coming under English sovereignty. Such is the case in the Province of Quebec. After the conquest of the eighteenth century the French-Canadians retained their language, their way of life and their law, based upon the customs of Paris and later influenced by the Code Civil. All around them developed communities of settlers who brought with them the common law, which was well established outside the Province of Quebec before the British North America Act of 1867 gave a type of written constitution to Canada. The result today is that the fundamental conceptions of the common

law apply in Quebec as much as in the rest of Canada, and take this form. First, despite a written constitution under the Act of 1867 and the Statute of Westminster, 1931, all Canada recognises the existence of constitutional conventions of a true common law pattern and has a common public law; and secondly, the common law conception of individual rights of liberty in all its phases has infused French law no less than that of other parts of the Dominion.[7] To the influence of common law it is perhaps also possible to trace in Quebec an increasing adherence to the doctrine of precedent, a development in which the function of the Judicial Committee of the Privy Council has played a notable part. One might compare the extent of acceptance in Louisiana, another civil law State in a common law country, of the fundamental premises of the common law.

To come nearer home, one may well ask why it was that Scotland retained its own legal system, based largely on Roman law, at a time when the common law was being carried to the farthest corners of the earth. The answer is simple. Nothing (except Christianity and Roman law) has yet successfully invaded Scotland, though Scotland has not been averse to the acceptance of gratuitous concepts of English law when they seemed sound and logical, such as the English doctrine of precedent. The unity of sovereignty which came about in 1603, the period of Coke, by the accession of a Scottish king to the throne of England represents, if anything, the reverse process. Calvin's Case [8] went far towards settling the legal consequences of this common sovereignty. But by a gradual process of attrition and infiltration certain principles of the common law appear to be crossing their northern frontier. Our common acceptance of constitutional principles, our common ideas on individual liberty and our common supreme court of appeal in the House of Lords are channels through which influences of the two systems may be mutually exercised. It is noteworthy, however, that while decisions of the House of Lords on Scottish appeals frequently make law for England—instances of which occur in *Donoghue* v. *Stevenson*,[9] *Shaw* v. *Gould* [10] and *Udny* v. *Udny* [11]—decisions

[7] See address by Mr. Justice Davis on 'The Common Law in Canada', *The Future of the Common Law*, pp. 164ff.
[8] (1608), 7 Rep. 2a.
[9] [1932] A.C. 562.
[10] (1868), L.R. 3 H.L. 55.
[11] (1869), L.R. 1 Sc. & Div. 441.

of the House on English appeals have only persuasive authority north of the Tweed.

If we look west to that part of Ireland called Eire (and here I must weigh my words with care, for there is Irishry about!) a curious situation presents itself. Ireland from the early Middle Ages had possessed a traditional and customary system of law administered by its numerous petty kings under the guidance of an almost hereditary class of jurists called Brehons. From the time of Henry II of England almost continuous attempts were made to impose the common law on Ireland, and until the more determined efforts of the sixteenth and seventeenth centuries that system was fighting a losing battle against the native Brehon law. Though English law was established within the Pale, and by Poyning's Law theoretically throughout the whole country, many English settlers and officials adopted Irish customs and Irish law, and as degenerate English were detested alike by both their own and their adopted countrymen. By the end of the nineteenth century the common law had obtained a firm hold on Ireland, but paradoxically, now that Eire has power, by virtue of Article 73 of the Constitution of 1922, to repeal the entirety of the common law which applied at that date, and there is therefore no further need to fight against it, the system has been retained. Decisions of English courts given before 1923 still bind courts of Eire, though later English decisions have only persuasive authority.[12] Ireland presents a case of the political and legal error of attempting to impose by conquest a foreign body of law upon a proud and independent people who have long enjoyed and preserved their indigenous system. The influence of the common law in other parts of the British Commonwealth is a matter of which time forbids discussion, but whether one looks at the written constitution of Australia, the Roman-Dutch legal systems of South Africa and British Guiana or the Spanish system of Trinidad, the spirit of the common law in the sense mentioned above is not far to seek.

But there is another aspect of the territorial expansion of the common law which must be mentioned. It is the extent to which the body of substantive rules and principles of law has found new roots abroad. It is a question which may, perhaps,

[12] See generally, Mr. Justice Hanna, 'The Common Law in Ireland', *The Future of the Common Law*, pp. 200ff.

best be answered by another question: to what extent is the substantive common law in England today the common law of the sixteenth and seventeenth centuries? How little of that now remains, even in its most static branch, the law of real property, is clear to any one who compares Coke's Institutes or Littleton's Tenures with a modern textbook; for between the two lie the Industrial Revolution, the work of Jeremy Bentham and a vast body of statute and judicial decision in the past hundred years which have gone far to change the content of the common law. The changes which have taken place in those lands to which colonisers took their legal system are more conspicuous because the adoption of its specific rules and principles has from the beginning been conditioned by the entire local situation. First the colonial settlers, then the pioneers who pushed forward the frontiers, had to live in conditions to which the formal aspects of the common law were utterly inappropriate, and as societies of various types developed the principles of the system were moulded into a basis for rules of law adequate to satisfy the needs of each society. The history of the common law in the United States of America illustrates this development, a story which none has told better than Professor Pound. 'The common law as the colonists knew it', he wrote,[13] 'was the law of the age of Coke, not the law of the age of Mansfield. It was heavily burdened with the formalism of the strict law. Its ideals were those of the relationally organised society of the Middle Ages, and so quite out of line with the needs and the ideas of men who were opening up the wilderness'. And alongside the unprecedented exploitation of natural resources and the development of commerce and industry which characterise the economic history of independent America, rules of law developed within the broad and flexible frame of the common law to satisfy individual and social needs more diverse and complex than the common law in its old home has been called upon to meet.[14] Yet the common law remains one of the chief common factors in all but one of the forty-eight States. It is the common law, not the law of Massachusetts, which is taught at Harvard. It is the common law, not the law of Connecticut, which is taught at Yale. It is the common law, in its American development, which is con-

[13] *The Formative Era of American Law* (1938), p. 6.
[14] See Stone, 'The Common Law in the United States', in *The Future of the Common Law*, p. 120.

tained in the American Law Institute's Restatement of the law. It is the common law which allows the decisions of a Californian court to be cited as precedents in a court of New York State. And the influence of the taught tradition of the common law on the 'nine old men' of the Supreme Court in their interpretation of the Constitution of the United States is a factor which cannot safely be ignored.

As a complete system the common law has probably reached its final territorial frontiers. The age of colonisation has passed, and there are now only two chief ways in which the common law can expand territorially. The first occurs when a country enjoying some other system of law decides to adopt an alien and more modern system, as both China and Japan did at the beginning of this century. For two good reasons they both preferred a code of civil law to the introduction of the common law. A code was more compact and precise and made a better starting-point for rapid legal development; and both countries lacked the instinct for the common law, without which the system could not work. Similar reasons may have prompted Turkey, in more recent years, to adopt the model of the Swiss code. The second direction in which the common law may still expand, if less spectacular than the wholesale reception of the system, is still of importance, and lies in the adoption by countries outside the common law world of individual ideas and conceptions of the common law. Thus, one can detect at the moment a tendency for the reimportation into French law of the principle of domicil as a personal law in preference to nationality. One finds in Germany the keenest interest in our legal institutions and a refreshing welcome to the idea of judicial independence from administrative control. It is this international commerce in legal concepts which at times leads not only to minor improvements but to far-reaching innovations in established legal systems.

What of the common law's frontiers with other branches of English law? Here indeed is a territory of no-man's land waiting to be explored. Professor Winfield, in the Preface to his well-known lectures on 'The Province of the Law of Tort', drew attention to this misty borderland which surrounds a subject of which he is at once the master, the disciple and the prophet. In one direction in particular, that of quasi-contract, we are much in his debt for dispelling those lurking mists and

for reclaiming this peculiarly English piece of unclaimed property. It would be as presumptuous as it would be vain to attempt to add here to what he has written. But there are other frontiers not only within but beyond the common law which are ill-defined, frontiers in which the common law stands entrenched (albeit across a respectful distance of no-man's land) in the face of administrative law, international law and those lesser rivals, divorce and admiralty, which were relegated in 1875 to the third division of the High Court. Until the middle of the nineteenth century these frontiers were very real. Courts of common law and courts of equity jealously guarded their jurisdiction. Ecclesiastical courts had exclusive competence in matrimonial causes and the grant of probate of the personal estates of the dead. The Court of Admiralty applied its own law to matters which fell within its maritime province. But in 1857 ecclesiastical jurisdiction in the matters mentioned was secularised in the newly-formed Courts of Probate and Matrimonial Causes, which in 1875 were combined with the Court of Admiralty into a single Division of the High Court. By 1881 the Court of Chancery and the courts of common law had become two other Divisions of the High Court, and appeal from all of these Divisions, with minor exceptions, now go to a common Court of Appeal and a common House of Lords. Though the intention of the Act was to fuse only the administration of common law and equity, the practical result is a tendency to unify those two bodies of law, and throughout the whole field of English law to stimulate a mutual infusion of legal ideas and techniques. Land law and questions relating to corporations before the passing of the Companies Acts, 1856–1862, for example, were mainly matters of common law jurisdiction. By the Judicature Acts of 1873–1875 both now fall generally within the province of the Chancery Division. The matters which now come before the Probate, Divorce and Admiralty Division are determined by judges trained in the general traditions of English law. Damages against a co-respondent in the Divorce Division are assessed on lines not so dissimilar from those against a seducer in the King's Bench Division. The principle of contribution between joint tortfeasors, brought into the common law by statute in 1935,[15] is a long-founded conception of the law of admiralty. The

[15] Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1).

granting of legal or equitable remedies since 1875 by any Division of the High Court, starting from limited beginnings in the Common Law Procedure Act, 1852 and the Chancery Amendment Act, 1858, requires that Chancery judges, for example, should not only know and apply the common law rules for the assessment and measure of damages, but must be able to determine the existence and violation of legal rights. Judges of one Division may be transferred to any other. But perhaps the strongest factor influencing this tendency towards making English law one is the fact that civil appeals go to a common Court of Appeal and that the House of Lords, the final Court of Appeal, is a common tribunal for both civil and criminal matters. It should not be thought that common law and equity have yet been fused into a single body of law, or that no further differences exist between other branches of English law. But there are indications of a definite tendency towards a uniformity of approach towards all branches of law. One aspect of this tendency is the fact that the common law has extended its frontiers into other branches of English law, not only by the infusion of common law principles, such as those relating to damages, but what is of far greater significance, it has strengthened throughout the whole body of English law the common law doctrine of precedent and technique of judicial decision. By the time that Lord Eldon had completed his work of consolidation and restatement of the principles of equity, that system was ripe for the adoption of many of the common law principles of judicial decision. Had Maitland been alive today he could have stated even more emphatically than he did the close relation between equity and common law.

The internal frontiers of the common law, the extent to which it satisfies the reasonable demands of men for legal protection, are conditioned by both the qualities and the shortcomings of that system. Its qualities lie in its flexibility to meet new demands as they arise. Its shortcomings are the failings of all law, in that it lags behind the demands of a progressive society, a weakness which is increased in the common law by strict adherence to the doctrine of precedent and by the attitude of judges towards statutory reform. In the law of contract, for example, there has long been felt a need for reform of the doctrine of consideration, a need which was expressed by the

Law Revision Committee in its Sixth Interim Report,[16] and for abolition of the corollary principle which prevents third party beneficiaries under a contract from enforcing it. Between Lord Mansfield's decision in *Pillans* v. *van Mierop* [17] and Mr. Justice Denning's recent judgment in *Central London Property Trust Ltd.* v. *High Trees House Ltd.*[18] lie almost two centuries of dissatisfaction with the doctrine of consideration. Yet judges refused to read into the Law of Property Act, 1925,[19] a general repeal of the rule of common law preventing enforcement of a contract by any person other than a party to it, so that such a person had to look for protection to the equitable conceptions of the trust or rely in tort on the extended duty of care if he could bring his case within the principle in *Donoghue* v. *Stevenson*.[20] In problems of tort the common law has found many new frontiers to conquer in the past hundred years, and the development of the principles of negligence is evidence of the way in which law has attempted to keep pace with the changing conditions of society, commerce and industry. Before it this particular frontier still lies wide open. But in another direction the traditional individualism of the common law has prevented the introduction into English law of the doctrine of abuse of rights,[21] preferring to rest on the inadequate law of nuisance.[22] Despite his rights of individual liberty, however, the reasonable man of the common law must not be too sensitive. English Courts are reluctant to interfere in the enforcement of claims to privacy when the violation of such claims falls short of trespass.[23] Of the variety of claims under this unprotected head of privacy, many are unsuitable for legal protection, but some, at least, merit recognition. A clear case of such interference is the unauthorised, and usually unexpected, taking of photographs, particularly of persons who either themselves are news or are in situations which make it. This is a frontier which has still to be crossed. To

[16] 1937 Cmd. 5449.
[17] (1765), 3 Burr. 1663.
[18] (1947), 1 K.B. 130.
[19] S. 56 (1), 'A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument'.
[20] [1932] A.C. 562.
[21] *Mayor of Bradford* v. *Pickles*, [1895] A.C. 587.
[22] *Hollywood Silver Fox Farm* v. *Emmett* (1936), 2 K.B. 468.
[23] *Lea* v. *Justice of the Peace Ltd. and R. J. Acford, Ltd.*, [1947].

take an example from criminal law, the present age has seen the creation of an ever-growing body of offences in which the common law element of *mens rea* is not required. These offences, of which the classic example is a bankrupt's obtaining credit without disclosing the fact of his bankruptcy,[24] are all of statutory origin, and represent an abandonment or a narrowing of principles of the common law in favour of social expedience. It is such statutory violation of the ancient frontiers of the common law which largely accounts for the judicial attitude towards statute evidenced in the strict interpretation of an Act of Parliament which appears to interfere with the common law. It accounts no less for the decrease of the respect for law, which Lord Templewood mentioned at the recent meeting of the Magistrates' Association. For popular respect for law may be measured by the extent to which it satisfies the feeling of common justice. But even apart from statutory restrictions, not all the frontiers of the common law are expanding. In such a living body of law there is bound to be retraction and obsolescence, as may be seen in the old methods of procedure and forms of action. The relational basis of the common law, for example, which is one of its chief characteristics, suffered many modifications during the nineteenth century at the hands of judges, swept away by theories of economic individualism. Yet it is not without interest that the age which abolished the proprietary disabilities of married women preserved the relational basis of the common law. We still speak of the law of master and servant and of husband and wife, not the law of employment and the law of marriage. In this present age of socialisation characterised by the legislative creation of social habits of thought and action the common law tradition of individualism finds a formidable barrier to its progress. The present tendencies of legislation, much of which is merely a response to the inexorable demands of our time, speeds the cycle of history and threatens to return us to a state of modern feudalism. We see it in the citizen's duties of military service, both in war and peace. We see it in governmental powers of control and direction of labour. We see it in legislation restricting the use and disposal of land, in what Professor Potter has called 'the twilight of landowning'.[25]

[24] *R.* v. *Leinster* (1924), 1 K.B. 311.
[25] *The Conveyancer and Property Lawyer*, Vol. 12 (N.S.), p. 3.

In these and in many other ways we can see a withdrawal of the individualism of the common law.

But if the common law is forced to retreat at one point, it finds new openings for attack elsewhere. Never since the age of Coke have its opportunities for progress been better. Within the foreseeable future it will be faced with problems in the law of tort arising from the development of atomic energy. Will the escape of radioactive waves, for instance, be brought under the rule in *Rylands* v. *Fletcher*,[26] or will the genius of the common law answer the question with some new principle? Will the common law be able to take in its stride the numerous and varied problems which an inevitable increase in air navigation will create? Here, indeed, are your current legal problems. What principle, for example, should apply to the determination of liability when a collision occurs between two aircraft flying over England? Does territorial jurisdiction extend indefinitely upwards, and if jurisdiction exists will the rule of the road or the rule of the sea apply; or will the common law discard both in favour of a new rule of the air? Would the same principle apply to a collision taking place over the high seas; and would any distinction be drawn between an ordinary aircraft and a flying boat? The analogy between aircraft and ships has already been rejected so far as concerns the liability of an aircraft to be arrested when in England by means of proceedings *in rem* for some tort or contractual obligation of its owner. These are only some of the questions to which at the moment no definite answer can be provided. The remedy which they suggest is a statute; but air accidents do not wait upon Parliamentary time, and the court may any day be faced with these or similar problems.

Already it is faced with a major conflict between its own traditions of individual freedom and the historic function of the judge on the one hand and on the other the lack of responsibility to courts of law for acts of administrative officials. It is a conflict of growing dimensions in which the personality of the judge is no mean factor. The English conflict of laws is a comparatively new and undeveloped body of law in which opportunities will continue to arise for the decision of new problems within the spirit of the common law. In this field the compass

[26] L.R. 3 H.L. 330.

which has guided English judges into vast tracts of unexplored territory is the conception of domicile, a conception of the civil law warily accepted first in the seventeenth century in succession cases. Domicile was later expanded by a peculiarly English technique to constitute the basis of a legal relationship between a person and the system of law of his permanent home founded on the common law concept of man as an individual of free will and not, as in modern civil law, as bound by ties of allegiance to the State. Through the adaptation of domicile to the peculiarly English principles of the common law the frontiers of law have been and are being farther and farther extended. How far conceptions of individual liberty inherent in the common law find new forms of expression may be judged from the recent decision of Lord Merriman, P., in *Apt.* v. *Apt.*,[27] in which for the first time the English Court was called upon to recognise as valid a marriage celebrated by proxy between a woman in England and a man in the Argentine, and in which the issue took the form of a direct conflict between the claims of individual freedom and of public policy.

The frontiers of the common law in the field of international law and international relations are vague and ill-defined. From time to time, and particularly in times of war, cases come before English courts which result in the recognition of rules of international law. Of such a kind was *Lorentzen* v. *Lydden*,[28] decided in 1942, which recognised the validity of extra-territorial legislation of the Norwegian Government in exile in England; and the long line of cases arising from Russian confiscatory and nationalising decrees between 1920 and 1935.[29] English decisions on the immunities and privileges of foreign sovereigns[30] and the numerous cases on British and alien nationality have enriched the common law by the absorption of whole branches of international law. For in so far as rules of international law are recognised by the courts they become part of the common law in the wider sense. Where they are embodied in statute,

[27] (1947), 1 All E.R. 620.
[28] (1942), 58 T.L.R. 178.
[29] *E.g., Russian Commercial & Industrial Bank* v. *Comptoir d'Escompte de Mulhouse*, [1925] A.C. 112; *Employers' Liability Corporation* v. *Sedgwick Collins*, [1927] A.C. 95; *Lazard Bros. & Co.* v. *Midland Bank Ltd.*, [1933] A.C. 289.
[30] *Mighell* v. *Sultan of Johore* (1894), 1 Q.B. 149; *Duff Development Co.* v. *Kelantan*, [1924] A.C. 797.

such as the Diplomatic Privileges Act, 1708 and the Diplomatic Privileges (Extension) Acts, 1944 and 1946, they at once pass into the body of the law. The past decade has seen a vast increase in the establishment by various states of their own trading organisations which, while engaging in private trade, are nevertheless strictly entitled to the privileges and immunities of sovereigns. Should disputes arising from the contracts made by such bodies come before our courts, the common law will find new problems to solve and new fields to conquer. The courts have already decided that, for purposes of choice of law, a sovereign party to a contract is in no different position from a private individual.[31] Will they deny to a state trading corporation sovereign immunity from jurisdiction?[32] Will they regard consideration as an essential to a contract not under seal to be governed by English law, when consideration is apparently not essential to the validity of a treaty?[33] Such problems the common law will have to face sooner or later, and when they arise will have to solve them in its indigenous spirit.

But there is a more important aspect of the frontiers of the common law with international law and international relations. It is the need for representatives of common law countries to infuse into international organisations and bring to international conferences something of the spirit of their own legal system. For the spirit of the common law is the spirit of restraint of anger and compromise of disagreements. It is the spirit of voluntary submission to the adjudication of disputes by a court of law. It is the spirit of free individualism which regards the small state as equally a person before the law as a great power. It is the spirit of respect for law itself; and no system is in greater need of the respect which gives it strength than is international law today. The common law claims no monopoly of these virtues, but their emphasis at the hands of statesmen and diplomats would do much for the salvation of international relations in our troubled age.

There remains one last frontier of the common law, and it is perhaps the most formidable of them all, for it is a frontier of the mind. It consists of an attitude of legal conservatism

[31] *R.* v. *International Trustee for Bondholders,* [1937] A.C. 500.
[32] Cf. *Duff Development Co.* v. *Kelantan* (above).
[33] Which is, of course, governed by international law.

which is at once the strength and the weakness of the English lawyer. Its foundations are the taught traditions of the common law and the traditional techniques of the Bench and the Bar which have been observed and practised throughout centuries of legal evolution. It may take the form of that exaggerated legalism which appeared from time to time in the nineteenth century, an attitude which took an unholy delight in the application of a rule of strict law to defeat alike justice and reasonable expectations. It may take the form of a worship of ancient precedents for their own sakes, a form of legal idolatry which Mr. Justice Holmes' strong dose of cynical acid should long ago have killed. It is a reflection in the legal mind of the perpetual conflict between the demand for certainty and the call for change, which raises subconsciously a barrier of tradition against imaginative legal pioneering. It is the foundation of the judicial attitude towards statutory innovations and of the body of judge-made law for the strict interpretation of statutes. But if these are the weaknesses inherent in the legal mind, they are but part of the price we must pay for a priceless heritage.

As I started with a text, I may perhaps be forgiven if I end with a moral. To look at a legal map of the world today is to see the common law at work in the most varied conditions of climate and society. The history of the common law is now the common legal history of many lands. And where the common law has gone, equity has followed. 'There is indubitably something', wrote Pound,[34] 'which enables English and Irish and American and Canadian and Australian lawyers to read each other's books and understand each other's arguments and apply each other's judicial decisions and adapt each other's legislation as surely as they are unable to understand the arguments and read effectively the books and apply the authoritative texts of the non-English speaking world'. The secret of this ability to speak and understand the same legal language is the pervading spirit of the common law in its widest sense. To ignore its potentialities in the development of English law is to refuse to learn from the experience of others. Professor Goodhart indeed administered a welcome corrective to certain emotional talk about the common bond of law which binds the United States and England,[35] and has emphasised the difference

[34] *The Future of the Common Law*, p. 6.
[35] *Essays in Jurisprudence and the Common Law*, p. 50.

in judicial attitude to precedent in the two countries. But even in this corrected perspective the fundamental principles of judicial independence and individual liberty, sanctified by a written constitution, remain at least theoretical absolutes in American doctrine and common factors of both our laws. The value of a study of comparative common law lies in the different developments of that system under the widely different local situations which it governs, not less than in the similarities which one finds. Its value lies in the lessons it can teach in the adaptation of ancient principles to new situations. The century and a half of American law reporting, for example, has produced in many fields, and particularly in contract, tort and the conflict of laws, a mass of judicial decisions on problems of a variety and detail such as the English Courts have not yet been called upon to solve. Their value as persuasive precedents is well recognised in England.[36] But if it has provided a rich source of judicial decisions, it has in its very wealth and quantity produced also a modified technique of using them. By and large, American courts follow a line of recent decisions, not a single precedent of a former age. The traditional common law function and technique of the judge have been maintained, but modified in the judicial spirit of the common law, by the courts themselves, to free the progress of law from the fetters of ancient precedents of which the social and economic context has passed into history. It is a development of the judicial technique within the broad spirit of the common law which has found its theoretical justification in what has been called the progressive sociological interpretation of precedent. Not only can we find in the common law systems precedents for the development of rules of strict law; we can find there ideas for the evolution of the doctrine of precedent itself. There is urgent need in the training of English lawyers for a study of comparative law, and above all of comparative common law, which can show by concrete developments from common fundamentals how similar and further progress can be made in meeting our own legal problems. From this approach can be appreciated both the achievements and the limitations of the spirit of English law as a creative factor in legal development throughout the common-law world.

When lawyers of today regard the common law as a mature

[36] See *e.g.*, *Apt.* v. *Apt* (1947), 1 All E.R. 620.

and perfect system (which it obviously is not), they do no more than re-echo the sentiments of Coke in the seventeenth century, Blackstone in the eighteenth and the Real Property Commissioners in the early nineteenth centuries. For the common law in every age has seemed to embody corresponding maturity and perfection. Such is its nature that it has been able to advance its frontiers to keep in sight of, if not to keep in line with, changing social and economic conditions. By this inherent power alone it has survived, and through the same power it will continue to advance so long as Englishmen are free. Let us then remember the legal explorers of the past who stand arrayed in Lincoln's Inn. Let us add to their proud company such men as Maitland and Pollock, Holmes and Holdsworth, Beale and Lord Atkin, and many others who have, each in his turn, each in his way, advanced the frontiers of the common law. Nor should we forget their living successors, names like Winfield and Pound, Williston and Lord Wright, who, trusting to the common lawyer's sixth sense, have thrust forward the boundaries of their system into virgin soil and placed upon its outbound paths signposts for you, their successors, in the march to unfound frontiers.

4

THE MAKING OF EVERYMAN AND HIS UNDOING

Richard O'Sullivan

In this paper the thesis I propose for your consideration is a simple one.

It is that over a certain period of time the laws and institutions of England were directed to the making of a certain type of man, whom I have called Everyman; and that since that time the laws and institutions of England have been directed to the unmaking of Everyman.

The name of Everyman will be familiar to you as the title of an old morality play in which God gives a command to Death:

> 'Go thou to Everyman,
> And show him in my name
> A pilgrimage he must on him take,
> Which he in no wise may escape;
> And that he bring with him sure reckoning
> Without delay or any tarrying'.

Like the play of Everyman, the story of Piers Plowman, and his fair field full of folk, is a story of the struggle of the human soul.

In medieval England the life of Everyman had a moral and religious purpose. After his victory at Hastings and even before he demanded the personal oath and loyalty of all free men, William the Conqueror proclaimed that 'one God shall be honoured throughout the whole of the kingdom, and the Christian faith shall be kept inviolate'.

Shortly after what Maitland calls 'the concrete conquest of England by a certain champion of Roman orthodoxy', William issued a decree that 'no bishop shall henceforth hold pleas in the Hundred Courts, nor shall they bring forward for the judgment of laymen any case which concerns spiritual jurisdiction; but whoever has been summoned for some suit or offence within the province of episcopal jurisdiction shall make answer in accordance with canon law'. In the course of time Thomas à Becket,

'fighting' (as Mr. Zachariah Brooke tells us) 'not only the battle of the English Church but of the whole Church and of the Pope', won for the Church in England the right to take its place with the rest of the Church in the administration of the canon law, with freedom of intercourse with the Pope, and the right to appeal to Rome. The freedom that had been won by Becket was ratified and, so to say, consecrated by the first clause of Magna Carta: 'Quod Ecclesia Anglicana libera sit et habeat omnia jura sua integra et libertates suas illaesas'.

Behind the separate organisation of Church and State in England and in Europe, we have, says Dr. Carlyle, to recognise the appearance in the consciousness of the civilised world of principles new and immensely significant. The first of these is the principle of the autonomy of the spiritual life. Behind the great conflict of Papacy and Empire, of Church and State, there lies a development of the conception of individuality or personality which was unknown to the ancient world. The soul of man has an individual relation with God which goes beyond the control of society. This does not mean that religion has no social aspect or that political societies have no moral or spiritual character, but it does mean that men have been compelled to recognise that the individual religious and moral experience transcends the authority of the political and even of the religious society, and that the religious society, as embodying the spiritual experience, cannot tolerate the control of the State. The separate organisation of Church and State means that the moral and the spiritual life of man is beyond the power and reach of the political officers of the community.

In the pursuit of a moral ideal the king was subject, like Everyman. In the preamble to Magna Carta, the king confesses that the charter was made and granted 'for the honour of God, for the exaltation of Holy Church, for the amendment of the kingdom, and for the good of the king's soul'. The medieval king, says Maitland, was every inch a king, but just for this reason he was every inch a man, and you did not talk nonsense about him. You did not ascribe to him immortality or ubiquity, or such powers as no mortal can wield. If you said he was Christ's Vicar, you meant what you said, and you might add that he would become the servant of the devil if he declined towards tyranny. 'In all that I have read I have seen very little

said of him that was not meant to be strictly and literally true of a man, of an Edward or a Henry'.

At the side of William the Norman when he defined the limits of lay and spiritual jurisdiction stood Lanfranc of Pavia, Master of Lombard and of Roman and of canon law, who in England carried all before him, even when the talk was of *sac* and of *soc*. Lanfranc was at once witness and representative in England of the new renaissance of law, of Roman and of canon law, which in the eleventh and the twelfth centuries spread outwards from Pavia and Bologna and now filled the intellectual centres and the life of Europe. In no other age since the classical days of the Roman law had so large a part of the sum total of intellectual endeavour been devoted to jurisprudence. In the reign of Henry II a strong centralised court, in touch with the main currents of the intellectual life of Europe, begins to make some general rules of law for all England. Among the itinerant justices of the king are Bartholomew of Exeter (who often hears ecclesiastical causes also as judge delegate of the Pope) and Walter Map, and Roger Hovenden the Chronicler. Richard, Bishop of London, in the *Dialogus de Scaccario,* and Hubert Walter, Bishop of Winchester, in the book that is called *Glanvil,* raise law to the level of literature. 'It was through the work of these men that the influence of the legal renaissance of the Continent made itself strongly felt in England. By their work and through that influence the foundations of the common law were so well and truly laid that it rules today not only in England but also in the many lands beyond the seas in which Englishmen have settled'.[1]

In all the centuries of its creative power and energy the common law was animated by a moral principle. For all the great lawyers from Bracton to Lord Mansfield jurisprudence was a part of ethics. In a sentence that will echo through the centuries and round the world, Bracton declares the first principle of the constitution: 'The king is under God and the law'. The theme is taken up by an anonymous scribe in one of the Year Books: 'The law is the highest inheritance of the king by which he and all his subjects shall be ruled; and if there were no law there would be no king and no inheritance'. For Sir John

[1] Holdsworth, *History of English Law,* Vol. 2, pp. 175–176.

Fortescue law is the pedagogue of justice: 'Human laws are none other than rules by which perfect justice is taught'. The moral ideal is clear in Lambard's *Eirenarcha* (1619), where it is said: 'The points of charge (of the justices in Quarter Sessions) do either concern God, the Prince or subject. All these laws do either command or prohibit things agreeing or repugnant to some of the four Cardinal Virtues, Prudence, Justice, Fortitude, or Temperance. All these ordinances do either draw us to the good or withdraw us from the evil of mind, body, or estate'.

In order to understand and appreciate the achievement of the common law and the type of man it made it is useful to take note of the social movement of pre-Norman times as it is described by Professor Stenton: 'The central force of old English social development may be described as the process by which a peasantry at first composed of essentially free men, acknowledging no law below the king, gradually lost economic and personal independence'. All the Germanic peoples recognised slavery. At the end of the Anglo-Saxon period the mass of the English folk were slaves or serfs or villeins or otherwise of unfree condition. The slave class, which was composed of men and women who were slaves by birth, or of those who in evil days had 'bowed their heads for bread', was tending to become merged in the miscellaneous class of persons who actually cultivated the soil. The cowherd, the ploughman, the cottar and their progeny were often serfs attached to the soil and sold with the soil; they were the most valuable part of the stock of the farm, and their pedigrees were carefully kept.

Such a state of things was inconsistent with the witness of Augustine that 'God did not make man to lord it over his fellows, but only to be master of irrational creatures'; and that 'the desire to rule over our equals is an intolerable lust of soul'. The Christian sense of the equality of human nature, which was a first principle with the Canonists, passed naturally into the texture of the common law. In the book that is called *Glanvil,* we meet at once the great conception of the common law, the *liber et legalis homo,* the free and lawful man, existing not merely in idea, but already, so to say, as an institution. In *Glanvil* is a writ from the king to the sheriff bidding him summon 'Octo liberos et legales homines', eight free and lawful men of the neighbourhood to be before the king or his justices on such and such a day

for such and such a purpose.[2] 'All through this period', says Sir William Holdsworth, 'the medieval common law was creating the idea of the normal person, the free and lawful man of the English law'. 'Among laymen', says Maitland, 'the time has indeed already come, when men of one sort, free and lawful men (*liberi et legales homines*), can be treated as men of the common, the ordinary, we may perhaps say, the normal sort, while men of all other sorts enjoy privileges or are subject to disabilities which can be called exceptional. The lay Englishman, free but not noble, who is of full age, and who has forfeited none of his rights by crime or sin, is the law's typical man, typical person'.[3]

The growth of the common law was thus unfavourable to the existence of a class of slaves or serfs or villeins or other men of unfree condition. In the course of time all the unfree and dependent classes were merged in one mass under the general title of *villani*. In the *Doctor and Student*, the theologian in the Dialogue gravely doubts the righteousness of villeinage: 'Methinketh it first good to see whether it may stand with conscience that one may claim another to be his villein, and that he may take from him his lands and goods, and put his body in prison if he will, it seemeth he loveth not his neighbour as himself that doth so to him'. In the end, in obedience to its own principles and in the interest of social welfare, the common law came to hold the villein to be a free and lawful man. The law of villein status was never repealed. It fell into disuse because the persons to whom it applied ceased to exist in the Tudor time. Implicit in our law from the beginning was the principle that Lord Mansfield translated into action in the case of the slave Somersett: 'By the common law of England, no man may hold property in another . . . and therefore the black must be discharged'.

The common law has thus a noble conception of man and a noble conception of law; of man as a reasonable being, and of law as a reasonable rule. By virtue of his nature as a reasonable being Everyman has a title to be free. And Everyman being free is answerable for his own acts and omissions. Again no man is answerable for the act of another unless he commanded it or consented to it: *quia quis pro alieno facto non est puniendus.*

[2] 'Legalis homo' implied freedom from legal disability of every kind, excommunication, outlawry, non-age, infamy caused by perjury, and so forth.

[3] Pollock and Maitland, *History of English Law*, Vol. 1, p. 407 (2nd ed.).

The mere relationship between lord and villein did not make the one responsible for the acts of the other. 'It would be against all reason to impute blame or default to a man where he has none in him, for the carelessness of his servant cannot be said to be his act'. The doctrine of a master's liability for a tort committed by his servant acting within the scope of his employment can hardly be traced in any definite shape beyond the beginning of the eighteenth century.

The common law conception of the legal responsibility of Everyman for his own acts springs from the conviction of the moral and intellectual autonomy of Everyman. By virtue of this autonomy each man is an original source of spontaneous and rational, and therefore of responsible, action. '*Fondé sur la substantialité de l'intellect et l'immortalité qu'elle entraîne, l'être individuel du chrétien acquiert la dignité d'un être permanent, indestructible, distinct de tout autre dans sa permanence même et source originale d'une activité rationelle dont l'exercise décidera de la destinée future de cet être responsable. Il ne faut pas se dissimuler que nous sommes ici à la source de toute la vie de l'esprit dans son double exercise théorique et pratique, puisque c'est en tant que rationnel, donc en tant que personne, que l'individu peut discerner le vrai du faux, c'est à dire avoir une science, et discerner le bien du mal, c'est à direavoir une morale*'.[4]

In the philosophy of the common law, Everyman is conceived to be not only a free and responsible man but also a good man. *De omni homine præsumitur quod sit bonus homo donec probetur in contrarium.* Everyman, being thus taken to be a good man (for all his frailty), is taken also to be a friend at heart to his fellow-man. There is in Everyman a natural inclination to the love of all men; as if each man was to every man a familiar and a friend. In the *Utopia* it is said: 'No man ought to be counted an enemy, which hath done no injury. The fellowship of nature is a strong league: and men be better and more surely knit together by love and benevolence than by covenants; by hearty affection of mind than by words'. In the philosophy of the common law, Everyman has a right to hold speech and intercourse with Everyman, and within the limits of justice to

[4] Etienne Gilson, *L'Esprit de la Philosophie Medievale* (Gifford Lectures) 1932, Vol. 1, p. 210.

exchange goods with him. In the portraits that Shakespeare draws of minor characters, such as the fool in *Lear,* or the gardeners and the groom in *Richard II,* or old Adam in *As You Like It,* we catch a reflection of the ordinary man as he appeared in the society of the sixteenth century. Take Corin, the shepherd, in his answer to Touchstone: 'Sir, I am a true labourer, I earn that I eat, get that I wear, owe no man hate, envy no man's happiness, glad of other men's good, content with my harm; and the greatest of my pride is to see my ewes graze and my lambs suck'. The common law was allergic to the theory that the nature of man is radically evil and that the proper life of man is 'poor, nasty, dull, brutish and short'. There is an inner logic in *Leviathan.* If the nature of man be radically evil, if he be *homo homini lupus,* he must obviously be coerced by some external power into decent courses and ways of living.

The friendship of male and female is the foundation of marriage. The fellowship of man and woman in marriage belongs to a different and a deeper plane of living than the ordinary relation between subject and subject or citizen and citizen. And the deepest friendship is of necessity the most enduring. The office of parent creates in its own right the most dignified status in society. The spouses who give life and being to the community are the chief agents of social welfare and the common good. The conclusions of modern psychology that the best guarantee of a happy adult life is a childhood spent in the visible love and protection of both parents is in line with the principles of the Canonists and the Civilians of Doctors Commons, who, over a period of centuries, built the institution of the English family and retained it in the fullness of the Christian tradition. As lately as the middle of the nineteenth century by the law of England 'an English marriage was indissoluble in any court. It was something that could not be broken; indissoluble in essence'. 'Not a single English counsel would have set his name to the opinion that judicial indissolubility was not a legal quality of every English marriage'.[5] Listen to Lord Stowell in a case in which one of the spouses sought a decree of judicial separation: 'To vindicate the policy of the law is no necessary part of the office of a judge; but if it were it would not be

[5] *Salvesen* (or von Lorang) v. *Austrian Property Administrator,* [1927] A.C. 641, at p. 661.

difficult to show that the law in this respect has acted with its usual wisdom and humanity, with that true wisdom and that real humanity that regards the general interests of mankind. For though in particular cases the repugnance of the law to dissolve the obligations of matrimonial co-habitation may operate with great severity upon individuals, yet it must be carefully remembered that the general happiness of the married life is secured by its indissolubility. When people understand that they must live together, except for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off; they become good husbands and good wives from the necessity of remaining husbands and wives, for necessity is a powerful master in teaching the duties which it imposes. If it were once understood that upon mutual disgust married persons might be legally separated, many couples, who now pass through the world with mutual comfort, with attention to their offspring and to the moral order of civil society, might have been at this moment living in a state of mutual unkindness, in a state of estrangement from their common offspring, and in a state of the most licentious and unreserved immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good'.

In certain respects, one may remark, Englishmen sought to maintain a higher level of morality in matters of marriage and of sex than did the Roman civil or the Roman canon law. At the Council of Merton in 1236, on a proposal for the introduction of the principle of *legitimatio per subsequens matrimonium*, the barons answered with one voice: '*Nolumus leges Angliæ mutari*', though, as Maitland points out, it was no baron but a lawyer, an ecclesiastic, a judge, Bracton's master, William Raleigh, who stood up for the English practice against the laws and canons and consensus of Christendom. In the *De Laudibus*,[6] Sir John Fortescue makes a spirited defence of the English rule over against the Roman rule which legitimated children born before matrimony as well as after, and allowed them to succeed to the parental inheritance. 'The law of England', says Fortescue, 'does not encourage sin nor favour sinners but deters them. And if it be understandable that the Church, urged on by the example of the Roman civil law, should extend her pity

[6] Chaps. 39–41.

to her children in such cases, that is no reason why the law of England should tolerate the practice or alter its rule '.

Again, in contradistinction to the Roman civil law, which tolerated such places as necessary institutions, the keeping of a bawdy house has been from the beginning a criminal offence at common law.

In the matter of the relation between parent and child the common law gave full recognition to the principles of natural law and to the natural rights of a father, not as guardian of his children, but as the father because he was the father. ' The law recognises the rights of the father because it recognises the natural duties of the father. Now the natural duties of a father are to treat his child with the utmost affection and with infinite tenderness, to forgive his child without stint and under all circumstances. . . . The law cannot inquire in every case how fathers have fulfilled their duty. The law does not interfere because of the great trust and faith it has in the natural affection of the father to perform his duties, and therefore gives him corresponding rights '.[7] In this passage one may note the words ' trust ' and ' faith '. This sense of trust recalls the saying of old judges that ' uses ' were at common law because ' Common law is common reason, and common reason bids men trust one another '.

The respect thus paid to the institution of marriage and the family gave rise to the saying which is recorded in *Semayne's Case,* 1604, that an Englishman's home is his castle. ' The house of Everyman is to him as his castle and fortress as well for defence against injury as for his repose . . . *domus sua cuique est tutissimum refugium* '. Even in modern times, a great common law judge, echoing an old tradition, has recognised as against the State a father's undoubted right ' as master of his own house, as king and ruler in his own family, to enforce his command by his own authority within his own domain '. ' The common law ', said Lord Atkin, ' does not regulate the form of agreements between spouses (living in amity). Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for little in these cold courts. . . . In respect of these promises, each house is a domain into which the king's

[7] Per Brett, M.R., *Re* Agar-Ellis (1883), 24 Ch.D. 317, at p. 327.

writ does not seek to run, and to which his officers do not seek to be admitted '.

The achievement of the common law, animated by the principles of Christian jurisprudence, was slowly to elaborate a social system based on the dignity of human personality and the intellectual and moral autonomy of Everyman. Of this system, as it developed in an agrarian economy, the social type was the copyholder or the yeoman. The copyhold had grown out of the old villein tenure, but now, says Sir Edward Coke, ' copyholders stand upon a sure ground; now they weigh not their lord's displeasure, they shake not at every sudden blast of wind; they eat, drink, and sleep securely, only having a special care of the main chance, *viz.* to perform carefully what duties and services so ever their tenure doth exact, and custom doth require: then let the lord frown, the copyholder cares not knowing himself safe and not within any danger '. The yeoman was either a copyholder or a freeholder. Many of the ancestors of the yeomanry of Elizabethan and Stuart days had followed the plough as bondmen. The increase in free personal status of those who had lately risen from an estate of villeinage and the advantage they took of that freedom to move about and improve their condition brought many tenants to the position of yeomen. The fact that the lands of yeomen were their own or under their direct control bred in them a sense of pride and a personal interest and responsibility not discernible nor to be expected in those who worked at somebody else's bidding and had to struggle too hard to make ends meet to derive much pleasure from the lands on which they laboured. An English yeoman was expected to be industrious. ' Gentlemen might live as they please, yeomen in their hearts despised the idleness and thriftlessness of the class above them '. In the Elizabethan and Stuart plays they are vigorous, self-respecting men who ask no favours and are the backbone of merry England. In the tracts they are ' the valiant race of the ancient English yeomanry . . . the principal base and foundation of the commonwealth '. They were ' the hard resistant fibre in the English character; the pith and substance of the country; the backbone of the English nation '.

In the industrial economy the counterpart of the yeoman was the small proprietor and the small independent craftsman. It was this class, says Dr. Lipson, which enlisted the unstinted praise

of contemporaries and ever since has been held up to the admiration of posterity. The ideal of the common law was a moral ideal: honest manufacture, a just price, a fair wage, a reasonable profit. To supply a bad article was wrong, to demand excessive payment for goods or labour was extortion. The moral value of every transaction was easily understood.

As a revelation of English social life and aspiration in the reign of Elizabeth and of James I, the registers of the University of Oxford for the period 1557–1622 contain some interesting material. The registers show:

Sons of Noblemen (Earls, Lords and Barons)	84
Sons of Knights	590
Sons of Esquires	902
Sons of Gentlemen	3615
Sons of Plebeians (including Yeomen)	6635
Sons of the Clergy	985
Those whose status is not given	758

One of the chief duties of yeomen in the centuries of the common law was the rendering of jury service. The juries, which became a most vital part of procedure in criminal and civil law, constituted perhaps the most important use of men in government. The burden of jury service in the Manorial and Hundred and County Court postulates the existence in England of a considerable class of men sufficiently leisured and affluent to be able to discharge the very extensive and constantly increasing mass of public duties imposed by statute and custom. The inability of other nations to follow 'the law by which the truth is sought in England' is said by Sir John Fortescue to be due to their inability to find adequate and similar juries. Much has been written of the jury as the safeguard of civil liberty. Little has been written of the burden of jury service or its training; its consumption of time and energy, its responsibility and danger; how through it men were thrust into the very arcana of the judiciary, and forced to become fact finders, judges, in the most important crises of one another's lives. For better or for worse, the lives, the limbs, the property, the prosperity or adversity, the happiness or sorrow of the bulk of the English people in most of the crises of their lives, depended upon the knowledge, discretion, goodwill or judgment of their neighbours.

In matters of local government, the State and the common

law recognised and used the community of the land that had an independent or a semi-independent life. These communities, by means of which local government was carried on, local jurisdiction exercised, and trade and agriculture organised, were, according to Sir William Holdsworth, the most striking of the achievements of the common law. The doctrine of the State that was reared on the classical groundwork of the Roman civil law had nothing to say of groups that mediated between the State and the individual. All intermediate groups were first degraded into the position of more or less arbitrarily fashioned creatures of mere positive law and in the end were obliterated. The fact that English local government was based upon semi-independent communities that were subordinated to law without losing their individual character and their independent life, and not upon bodies which were mere delegates of a sovereign State, constitutes, as Gneist has pointed out, the peculiarity of English self-government. And to this system of self-government the success of parliamentary government (in the measure in which it has been a success) is said to be due. The evolution of a particular mode of local government based upon the old independent communities of the land, with the common law as sole controller of these organs of local government, and a parliament representing these communities or communes, explains the development of two leading principles of the constitution : the system of self-government and the rule of law.

The aspiration and, in large measure, the achievement of the common law was thus to raise Everyman to the status and dignity of freedom. A free man is his own man ; one who is master of his own acts, who lives on his own, one who is able to manage his own family, maintain and educate his own children, and administer his own property and his own affairs. The common law envisages society as an association of families of free and lawful men and women living in the fellowship of a free community. In the opening sentences of the first book written in English on the English constitution, Sir John Fortescue states : ' There bith two kyndes off kyndomes, of the wich that on is a lordship callid in laten *dominium regale,* and that other is callid *dominium politicum et regale.* And thai diuersen in that the first kynge may rule his peple bi suche lawes as he makyth hym self. And therefore he mey sett uppon thaim tayles and other

imposicions such as he wol hym self, withowt thair assent. The secounde kynge may not rule his peple by other lawes than such as thai assenten unto. And therefore he mey sett upon thaim non imposicions withowt thair owne assent. This diuersite is wel taught bi Seynt Thomas in his boke wich he wrote *ad regem Cipri de regimine principum'*. In the *De Laudibus*,[8] Fortescue insists that the king of England is not able to change the laws of his kingdom at pleasure, for he rules his people not by a royal government, but by a government that is political as well as royal. 'If he were to preside over them with a power entirely royal, he would be able to change the laws of his realm and impose on them taxes and other burdens without consulting them. This is the sort of dominion which the Roman civil law indicates: *quod principi placuit legis habet vigorem*. But the case is far otherwise with the king ruling politically, because he is not able to change the laws without the assent of his subjects nor to burden an unwilling people with strange imposts; so that ruled by laws that they themselves desire, they freely enjoy their properties and are despoiled neither by their own king nor any other'.

The teaching of Fortescue is the same in substance as that of Henry of Bracton, the father of the common law: 'The king himself is subject to no man but he is subject to God and the law, for the law makes the king. Let the king then attribute to the law what the law attributes to him, namely, dominion and power. For there is no king where arbitrary will and not law is the principle of his rule'.

In the constitutional struggles of the seventeenth century the books of Bracton and of Fortescue were in the hands, and their words were on the lips, of every man who sought to defend the old tradition against the new doctrine of the prerogative and the divine right of kings. The conflict is exhibited in the clash between James I and Sir Edward Coke in the Star Chamber in 1616.

> JAMES: 'It is atheism and blasphemy to dispute what God can do. Good Christians content themselves with His Will revealed in His Word. So it is presumption and high contempt in a subject to dispute what a king can do

[8] Chaps. 34–36.

or say, that a king cannot do this or that but rest in that which is the King's Will revealed in his Law'.

COKE: 'Your Majesty, the law is the golden measure to try the causes of his subjects and which protects His Majesty in safety and peace. The king cannot take any case out of his courts and give judgment upon it himself. The judgments are always given *per curiam* and the judges are sworn to execute justice according to the law and customs of England'.

JAMES: 'This means that I shall be under the law which it is treason to affirm'.

COKE: 'Sir, Bracton saith: *Quod rex non debet esse sub homine sed sub deo et sub lege*'.

'His Majesty fell into that high indignation as the like was never known in him, looking and speaking fiercely with bended fist, offering to strike him, which the Lord Coke perceiving, fell flat on all fower'.

The claim of the Crown to rule by right of prerogative was debated in the courts, in Parliament, and on the battlefield, and finally issued in the Revolution of 1689. Let us recall the summary Macaulay gave of the effects of the Revolution: 'The change seems small. Not a single flower of the Crown was cut. Not a single new right was given to the people. The whole English law, substantive and adjective, was in the judgment of all the greatest lawyers, of Holt and Treby, of Maynard and Somers, almost exactly the same after the Revolution as before it. Some controverted points had been decided according to the sense of the best jurists; and there had been a slight deviation from the ordinary course of succession. This was all; and this was enough'.

Not quite all, perhaps; and more than enough. Sir William Holdsworth points out that the Revolution did for the State what the Reformation had done for the Church. The summary of Macaulay as to the effects of the Revolution is, he says, if applied to the Reformation both good law and sound Anglican doctrine. But if we look a little beyond the immediate consequences of either the Reformation or the Revolution, we see that the changes involved have been very far reaching. The result of the Reformation was the abolition of the dual control of Church and State, the transference to the State of complete

control over the Church, the substitution for the canon law of the king's ecclesiastical law. The result of the Revolution was the transference of control over the Executive from the Prerogative to Parliament through the growth of the Cabinet system. A power which controlled Church and State necessarily had something of a divine character. The divine right of kings had been exchanged for the divine right of Parliament.

In this way the new conception of sovereignty which developed in the course of time into the modern doctrine of parliamentary omnipotence altered the whole character and balance of the English constitution. The new Anglican Church had no power in its own right to define the doctrines of the Christian faith or the principles of Christian morals; or to make new rules of canon law.

The cessation of the academic study of the canon law and the disappearance of the canonists of the authentic tradition from the Chancery and the Courts Christian, was naturally followed by a slow change in the moral and intellectual principles which guided the action of the Executive and the legislation of Parliament and the administration of justice in the Courts of Chancery and of Common law. With the decline of the science of natural law which lay at the foundation alike of equity and of common law came the substitution for the old religious and moral background of a new background of material force on which the sovereign State was based. 'The legislation which had deposed the Pope', says Sir William Holdsworth, 'and made the Church an integral part of the State, had made it clear that the morality of the provisions of a law or the reasons which induced the legislatures to pass it could not be regarded by the courts'. 'It was realised that Acts of Parliament, whether public or private, were legislative in character; and the judges are obliged to admit that these Acts, however morally unjust, must be obeyed. There was no need therefore for the courts of common law to be anything but useful servants of the Crown'. For Thomas Hobbes, law is the command of a sovereign, which, though it may be iniquitous, cannot be unjust. The idea that the rules of divine and natural law bound the whole State, prince and people, withered away and was openly rejected. In the eighteenth century Blackstone could write that Parliament 'hath sovereign and uncontrolled authority in making laws; this being

the place where that *absolute despotic power,* which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms'. In the current edition of May's *Parliamentary Practice* it is said that 'the constitution has assigned no limits to the authority of Parliament. . . . A law may be unjust and contrary to the principles of sound government: but Parliament is not controlled in its discretion, and when it errs its errors can only be corrected by itself'.

Omnipotence has no fellowship with freedom. The emergence of an omnipotent Parliament no longer bound or guided by principles of justice or the moral law led almost at once to the destruction of the yeomanry and the small independent craftsmen. The Houses of Parliament, the central Executive and local bodies of administration, all worked towards a common end: the advancement of the interests of a great commercial and landowning aristocracy. Parliament itself assisted Enclosure by allowing it to be done by private Acts of Parliament. The policy of Enclosures tended always to the disappearance of the small landowner. Arthur Young says that by nineteen out of twenty Enclosure Bills the poor are injured and some grossly injured. A very poor man might truly say: 'I had a cow, and an Act of Parliament has taken it from me'. The small farmer was beaten by the larger men just as the small craftsman found himself unable to compete with the commercial spirit of the great masters of the new industry. In despair he abandoned his holding to seek a new life in town or abroad; or fell back into the class of landless labourers whose numbers had already been recruited from the cottagers. Within a century of the Revolution the yeomanry, once the pride of the nation, had been annihilated. In 1770 Goldsmith wrote *The Deserted Village.* When Mill penned his *Treatise on Political Economy* the yeoman was only a memory: 'The yeomanry who were vaunted as the glory of England while they existed and have been so much mourned o'er since they disappeared were either small proprietors or small farmers, and if they were mostly the last, the character they bore for sturdy independence is the more noticeable'. The first use of the omnipotence of Parliament was thus to attack and to undo the small farmers and the small proprietors. In the grim phrase of Mr. Howard Roberts' book on *Town and Country Planning,* 1946, 'the yeomen became the slaves of the Industrial Revolution'.

The effort of omnipotence to undermine and to undo the independent type of citizen has continued into our own time. It is intolerant of the 'free and lawful' man. A typical instance lately came before the Court of Appeal: a local authority and the Ministry of Health acting in combination first denied to a householder the elementary right of knowing under what authority they proposed to deprive him of his home and next sought 'to bludgeon him into submission' to their illegal demand. The ideal of modern legislation seems to be, in place of the free and lawful man, to bring into existence a dependent creature, of impaired responsibility, and scarcely free. It is a sign of the new citizen that in an increasing number of instances proceedings may be brought in his name without his consent, and even against his will, by a subordinate official of one government department or another.

The new creature of statute law partakes somewhat of the proletarian condition. He is unable to live on his own. The wage he receives is not sufficient to enable him to maintain and educate his children. Accordingly in 1891, the State took over the whole duty and the whole cost of educating the children of the nation. The Children's Act of 1908 proceeded on the principle that the child was no longer the child of the parent; it is now the child of the State. 'He that hath dominion over the child', said Hobbes, 'hath dominion also over the children of the child and over the children's children. For he that hath dominion over the person of a man, hath dominion over all that is his'. In the Education Act of 1921 some of the old common law rights still seemed to adhere to the parents. The Education Bill of 1943 carefully eliminated every trace of parental right that appeared in the Act of 1921. If, under pressure from a few, some semblance of these rights was nominally restored in vague words at the committee stage the intention of authority was reasonably clear and is made more clear in the administration of the Act. The child is now the child of the State.

In the first paragraph of the White Paper on Educational Reconstruction children were said to be the 'assets' of the nation. In a book entitled *Our Towns,* which is referred to in the White Paper, the hope is expressed that 'John Smith's child may become in truth John Bull's child, a cherished part of its country's capital'. In the debate on 'Depopulation' Dr. Edith Summer-

skill, referring to ' woman's revolt in the home ', declared : ' She has refused to produce the most valuable commodity in the world, the embryo worker '. Assets, capital, commodity : the words seem to betoken a change in our concept of children, which corresponds perhaps with a changing concept of the State. England is being assimilated more and more to a trading corporation. Our thought and life are certainly suffering from the errors of the economists who conceived society in the image of two or more men cast upon an otherwise uninhabited island. The family unit is eliminated. All our political thinking is in terms of a supposed conflict between the individual and the State. The illegitimate child, *filius nullius,* was for John Stuart Mill, and is for his successors, a norm. ' I hold that to no child, merely as such, anything more is due than what is admitted to be due to an illegitimate child '. In a recent book on *The Case for Socialism* the ' profoundly anti-social consequences of the institution of inheritance ' is said to be ' one of the three fundamentals of the socialist case '.

Individualism and socialism are alike hostile to the idea of the family and to its establishment on an economic base. Individualism and socialism are alike favourable to the concept of marriage as a terminable relation between the spouses, which means that the child no longer has an anchorage in his own home. In these circumstances it is a matter of logical and, one may say, of social necessity that the child should be rescued from an unhappy and uncertain home, and sheltered under the more permanent care of the State or the local authority. Even for children who continue to live in their own homes, the State has assumed many of the old duties and responsibilities of parents—educating, feeding and protecting the young—leaving only to parents (as Professor Alfred Crew has pointed out) the responsibilities that relate to conception and pregnancy. These responsibilities are lessened to some extent by the public provision of birth control clinics. And the House of Lords—which for us lawyers is an infallible tribunal—has in its wisdom lately revealed that ' The institution of marriage generally is not necessary for the procreation of children ' ; and that Christian marriage need have little or no relation to pregnancy or conception. In this state of things, generous minds in the medical profession have evolved the idea of artificial insemination ; and in the shadows

one may discern the figure of what is called 'the anonymous donor', who appears to be the latest embodiment of English chivalry. The altruism of even such a benefactor is apt none the less to be defeated. In a speech which is reported in *The Times* newspaper of May 13, 1946, the Attorney-General said: 'Parliament is sovereign; it can make any laws. It could ordain that all blue eyed babies shall be destroyed at birth; but it has been recognised that it is no good passing laws unless you can be reasonably sure that, in the eventualities which they contemplate, these laws will be supported and can be enforced'. Jurisprudence, you observe, is a nice calculation of force. With a State medical service, the fate of the blue eyed babies will be less uncertain.

The decline in the status of parent and child goes with a decline in the status of marriage. In the case of *Russell* v. *Russell*,[9] Lord Sumner stated: 'I am afraid that the sanctity of married intercourse passed into the limbo of lost causes and impossible loyalties in 1857. You cannot give the spouses the legal right to have their married life investigated in open court with a view to its formal and legal termination, without being prepared, when necessary, to violate the sanctity of that marriage'. A distinguished professor of Roman law declares that the highly developed sense of dignity and decency of the Romans prevented them from discussing the intimacies of marriage and family life in the courts. 'A modern divorce suit would have seemed to them shameless'. From time to time since 1857 the grounds of divorce and the facilities for obtaining divorce have been extended; there has been a progressive downgrading not to say de-grading of the idea and the institution of marriage. It is common form nowadays to eliminate the ceremony at the Register Office. A woman changes her name by deed poll and passes as the wife of the man whose name she takes.

In the House of Lords in 1938 one of the Law Lords declared that: 'What was once a holy estate enduring for the joint lives of the spouses is steadily assuming the characteristics of a contract for a tenancy at will'. Parliamentarians talk of social security. Where is the social security if a husband is no longer sure of the fidelity of his wife; and the wife is no longer

[9] [1924] A.C. 687.

sure of the fidelity of her husband? If a child is no longer certain that he may not have tomorrow a new father or a new mother as the case may be?

As lately as 1917, in the House of Lords, Lord Sumner observed that: 'The English family is built on Christian ideas and if the national religion is not Christian there is none'. The words were spoken in a case which raised an issue: Is the maintenance of the Christian religion part of the policy of the English law? A bequest of money had been left by will to a society whose purposes were confessedly anti-Christian. Was the bequest valid? By a majority of four to one (Lord Finlay, Lord Chancellor, dissenting) the bequest was held to be valid. 'My Lords', said Lord Sumner in the leading judgment of the majority, 'I take the memorandum to be that of a society deliberately and entirely anti-Christian. If the respondents are an anti-Christian society, is the maxim that "Christianity is part of the law of England" true? And, if so, in what sense? (He examines the statutes and cases) My Lords, with all respect for the great names of the lawyers who have used it, the phrase "Christianity is part of the law of England" is really not law; it is rhetoric'.[10]

Omnipotence, of necessity, has no equal. In modern legislation, as in modern jurisprudence, there is no God. The law of God is no longer the foundation of the law of England. As long ago as 1861, one of the Law Lords declared in a marriage case: 'We do not hold the marriage to be void because it is contrary to the law of God, but because our law has prohibited it on the ground of being contrary to God's law. It is our law which makes the marriage void, and not the law of God'. One marks the courtesy and the condescension which give validity and force to the infirmity of the law of God.

If there be no God, man can not be made in the image and likeness of God. In whose image, then, is he made? Is there any spiritual principle in man? Has he any intellectual and moral autonomy? Is he in truth an original source of spontaneous and responsible action? In a recent book by Mr. Douglas Jay it is said: 'Housewives as a whole cannot be trusted to buy all the right things, where nutrition and health are concerned. This is really no more than an extension of the

10 *Bowman* v. *Secular Society Ltd.*, [1917] A.C. 406, at pp. 452, 464.

principle according to which the housewife herself would not trust a child of four to select the week's purchases. For in the case of nutrition or health the gentleman in Whitehall really does know better what is good for people than the people themselves'. Evidently, the gentleman in Whitehall always does know better what is good for people than the people themselves. It is the principle of totalitarianism.

If the doctrine be false (as I believe it to be false) then, by refusing to allow Everyman to exercise his independent mind and will, we are wasting all the moral and intellectual assets of our people. If the doctrine be true (and it is the ruling idea) then you and I are mentally or morally incomplete, not to say defective; and need, for the perfection of our mind and will, the light of the gentleman in Whitehall which lighteth Everyman that cometh into the realm.

On this view no one of us is any longer in any real sense a *persona*: a being of intellectual and moral autonomy: an original source of spontaneous and responsible action.

Is there any spiritual principle in us? Is our life any longer the struggle of the human soul? Are we no longer pilgrims upon earth? As a lawyer, I do not invite an answer to a question that goes beyond law.

As a lawyer I do invite you, on what you have read, to conclude that the laws and institutions of England are now being directed to the unmaking of the type whom I have called Everyman.

5

THE HOUSE OF LORDS AND ITS REFORM

R. C. FitzGerald

Before dealing with the question of reform we must remind ourselves of a few facts concerning the existing House of Lords.

It is the oldest Second Chamber in the world, and has been a constituent part of the Legislature throughout the whole of its existence—a period of something like 650 years. While little change has taken place in its constitution during that period its size has greatly increased since the two archbishops, eighteen bishops, approximately seventy abbots and other ecclesiastics, seven earls and forty-one barons—a total of less than 140—were summoned to the Model Parliament of 1295. The total membership of the present House of Lords is something in the order of 850, this membership consisting of the Lords Spiritual and the temporal peers.

The Lords Spiritual number twenty-six and comprise the two archbishops, the Bishops of London, Durham and Winchester, and the next twenty-one senior holders of bishoprics of the Church of England. As Lords of Parliament they are entitled to all the privileges of Parliament, but as they are not ennobled in blood, they are not peers and therefore they cannot claim 'trial by nobility'. It is the holders for the time being of these spiritual offices who are entitled to sit in the House—the seat goes with the office—so that when, *e.g.*, an archbishop resigns his office he is no longer entitled to sit in the House unless, of course, a temporal peerage is conferred upon him, as was done in the case of Archbishop Lang.

The temporal peers, who now number approximately 825 (including about twenty-six minors), comprise *first,* the holders of peerages created in the peerage of England before 1707 (*i.e.* before the Act of Union with Scotland); the holders of peerages created in the peerage of Great Britain from 1707 to 1801 (*i.e.* after the Act of Union with Scotland and before the Act of Union with Ireland); and the holders of peerages of the

United Kingdom created since 1801. All these peers constitute the hereditary peers of the United Kingdom; *secondly,* the sixteen representative peers of Scotland elected from their own number for each Parliament by the hereditary peers of Scotland as provided for by the Act of Union, 1707; *thirdly,* the representative peers of Ireland, who are elected for life, their tenure thus differing from that of the Scottish representative peers. The Irish peers were entitled to elect twenty-eight of their number as representative members of the House of Lords, but the office of Lord Chancellor of Ireland was abolished when the Irish Free State (now Eire) became a self-governing Dominion in 1922, with the result that the machinery for their election ceased to function and there have been no elections since that date. The present number of Irish representative peers is, I believe, seven, so that there are twenty-one vacancies; and *fourthly,* the nine Lords of Appeal in Ordinary, who are appointed to exercise the judicial functions of the House, and who hold their seats for life. In this respect they differ from the Lords Spiritual, as a Lord of Appeal in Ordinary remains entitled to sit in the House of Lords after resigning his judicial office. Their peerages are not, however, hereditary peerages. By statute [1] a person cannot be appointed a Lord of Appeal in Ordinary unless either he has held high judicial office for at least two years or has practised at the Bar for at least fifteen years.

The modern method of creating peerages is by Letters Patent, but in olden times a hereditary peerage was created by the issue of a writ of summons to the House of Lords, followed by the taking of his seat by the person to whom the writ of summons was addressed. An important distinction between the two methods is that a peerage created by a writ of summons descends to the heirs general of the holder of the peerage, and so can devolve upon a female, but a peerage created by Letters Patent descends in accordance with the limitations contained in the Letters Patent. The Letters Patent can, of course, provide that the peerage shall devolve upon females, and sometimes when the recipient of the peerage has no direct male heir the Letters Patent provide that the peerage shall descend to his daughter and her issue, as was done, *e.g.* in the Strathcona peerage, and in the Mountbatten peerage. But usually the Letters Patent limit the descent to males.

[1] Appellate Jurisdiction Acts, 1876, 1913 and 1929.

An individual writ of summons must be received for each Parliament by a peer before he can take his seat, but a writ of summons cannot be withheld from a peer who is entitled to it. And in this connection, the masculine does not include the feminine. The case of *Viscountess Rhondda's Claim* [2] decided that the Sex Disqualification (Removal) Act, 1919, did not give a peeress in her own right the right to receive a writ of summons to Parliament. In 1930 a resolution to admit peeresses in their own right to the House of Lords was defeated. The consequence is that a woman cannot sit in the House of Lords. There are about twenty-two peeresses in their own right. Other persons not entitled to receive writs of summons are bankrupt peers, aliens and infants. A peer who has been convicted of felony followed by penal servitude or imprisonment with hard labour or for at least twelve months is disqualified from sitting or voting until either he has completed his sentence or been pardoned.

The temporal peers consist of dukes, marquesses, earls, viscounts and barons, each with a specific precedence and place in the House; usually no regard is paid to the order of seating, but those peers who support the Government of the day sit on the spiritual side of the House, *i.e.* on the right of the Woolsack, while those who are opposed to the Government sit on the temporal side, *i.e.* on the left side of the Woolsack. A peer who wishes to remain neutral sits on the cross benches by the Bar of the House.

Reference has already been made to the great increase in size of the House. More than 900 peerages have been created since 1830, *i.e.* since the passing of the Reform Act, 1832, and of these more than one-half have been created since 1906. There are not fifty hereditary peers whose peerages were created prior to the Revolution of 1689, and of this small number only about one-third are peerages created before the accession of Henry VII in 1485. It is difficult to understand how, in face of these figures, any one can contend that the House of Lords is an aristocratic body. Ancient lineage is conspicuous by its absence. The vast majority of the members of the House of Lords are persons who were commoners by birth, or are persons whose immediate ancestors were commoners, and who, for one reason or another, have been given peerages. The character of the House of Lords

[2] [1922] A.C. 339.

underwent a great change during the long reign of George III (1760–1820). At the beginning of that reign there were 174 peers; at the end 562. In other words, 388 peerages were created in fifty-nine years. If one looks at the personnel of the present House of Lords one sees that it is composed to a fairly considerable extent of persons who have performed great public services, such as former colonial governors and judges, or who are well-known figures in, *e.g.*, the world of industry and commerce or in the professions. Many of them continue to live in the fairly modest suburban villas they were occupying at the time of their ennoblement because, even if other residences were available, they could not afford to run bigger establishments. Gone are the days when a peer could, by social convention, only live in Mayfair or Belgravia, and then only during certain months of the year, the rest of the year being spent on his lordship's sporting estates, or one of them, and when, no matter where he was, he had to be surrounded by a horde of servants. There are now peers whose wives still do the washing, and are thought of more highly for doing so. This country has experienced, and is still experiencing, great changes in its social life. New privileged classes have come into existence, and their parliamentary representatives are to be found, not in the House of Lords, but in the House of Commons. It has been accurate for some time now to regard the House of Lords as a place where one will, so far as the active members of that House are concerned, find mature wisdom and considerable learning and culture being placed at the disposal of the State without remuneration.

Since 1886 social reform has been the deliberate aim, first, of the Liberal Party, and then of the Labour Party, which Party appears to have succeeded to the political position formerly held by the Liberal Party. This deliberate policy was and is bound to lead to clashes between those two political parties, on the one hand, and the House of Lords, which is largely representative of the Conservative Party, on the other. The Liberals experienced many reverses during the period 1886–1914, including, *e.g.*, the rejection by the House of Lords of the first Home Rule Bill in 1886. It must be remembered that until the passing of the Parliament Act, 1911, if either of the two Houses of Parliament rejected a Bill, that Bill could not be presented for the Royal

Assent. In other words, one House could frustrate even the most laudable measures of the other House, the only limitation—and a most important one—being that since 1680 the House of Lords has had no power to amend Money Bills. The Upper House could reject financial measures, which they did in 1860 when throwing out Mr. Gladstone's proposals for a repeal of the paper duties, but it was their attitude to Mr. Lloyd George's Budget of 1909 which so seriously undermined their power and prestige that they have not recovered, and can now never recover, from the consequences of their conduct. On November 30, 1909, the Upper House passed a motion to the effect that they would not be justified in giving their consent to the Finance Bill until it had been submitted to the electorate, and having regard to the political situation at that time, this decision could only mean that swords had been drawn between the two Houses. On the 2nd December—two days later—the House of Commons passed a resolution ' that the action of the House of Lords in refusing to pass into law the provisions made by this House for the service of the year is a breach of the constitution and a usurpation of the rights of the Commons '. On the following day Parliament was prorogued, and on January 10, 1910, the King accepted the Prime Minister's (Mr. Asquith) advice to dissolve Parliament. The subsequent General Election, notwithstanding the closeness of the result—275 Liberals compared with 273 Unionists (Conservatives)—in effect induced the Upper House to pass the Budget, but obviously this could, and did, not dispose of the constitutional issue, and on March 25, 1910, Mr. Asquith introduced in the House of Commons the three Resolutions which form the basis of the Parliament Act, 1911.

The parliamentary debate on these Resolutions was of a very high standard. The attitude adopted by Conservative speakers in the House of Commons was that the Resolutions were an attempt to set up single chamber government, and that, while the House of Lords should be reformed, its powers, except as regards financial matters, should be the same as those of the House of Commons. Members of the Liberal Government, in particular Sir William Robson, the Attorney-General, ably dismissed all these contentions of the Opposition. The Resolutions were passed, and on April 14, 1910, the Parliament Bill

was introduced by Mr. Asquith, and was supported by, among others, Mr. Winston Churchill. The death of King Edward VII on May 6 was indirectly responsible for both sides endeavouring to settle their differences by compromise, a constitutional conference consisting of four representatives of each side holding a series of meetings between June and November but failing to reach agreement. Parliament was dissolved on November 28, and a General Election took place the following month, the result being that the same number (272) of Liberal and Conservative Members were returned. The four seats lost by them were shared equally by the Labour Party and the Irish Nationalists, who had forty-two and eighty-four seats respectively. The Parliament Bill was reintroduced on February 21, 1911, and passed through all its stages in the House of Commons by May 15. It reached the Upper House eight days later, where it was amended in important respects. On July 24 the Prime Minister proposed in the House of Commons the rejection of these amendments, a proposal which caused extraordinary happenings in that House. The announcement by the Prime Minister in a letter to Mr. Balfour of the King's promise to exercise his prerogative right to create sufficient peers to enable the Parliament Bill to be passed made the Upper House realize that the Parliament Bill would be passed, and they eventually decided to abstain from voting, the result being that the Bill was passed without their amendments.

Turning now to the everyday functions of the present House of Lords, an enumeration of them is all that is required at this stage, as they will be dealt with more fully under the head of specific reforms. They are:—

1. As the Legislature consists of the King, the House of Lords, and the House of Commons, any Bill, other than a Money Bill, can originate in the House of Lords and, in fact, Bills of a non-controversial character, *e.g.* Bills affecting the profession of solicitors, are first introduced in the Upper House. There they receive proper consideration and treatment, and are carefully drafted, and very little time need, as a rule, be devoted by the House of Commons to such measures.

2. National policy is often debated by the peers, and the debates are of great value to all persons who really wish to understand the matters at issue. As a peer has no political responsibility to an electorate, there is no need for him to indulge

in the pastime of talking for talking's sake, a pastime much favoured 'in the other place', where the Members have sometimes to think of their constituents. As a general rule a peer only takes part if he can make a definite contribution to the debate. It is refreshing, after reading a report of the debate on a particular matter in the House of Commons, to read what their lordships had to say on the same question.

3. Through its committees it exercises certain functions of a technical nature. Thus, more often than not, Provisional Orders receive hardly any serious consideration in the House of Commons, but they often receive fairly adequate consideration in the Upper House. The House of Lords has been a more vigilant watchdog of delegated legislation than the House of Commons, and on that ground alone it has earned the gratitude of the electorate. More than one-half, too, of private and local Bills are considered by committees of the Upper House before the other House sees them, which results in an important saving of time to the Lower House.

4. It is the final Court of Appeal. Although by strict law every peer is entitled to take part in the judicial functions of the House of Lords, by constitutional convention only the Lord Chancellor and the Lords of Appeal in Ordinary do so.

5. It debates Bills sent to it by the House of Commons. The exercise of this function is subject to the provisions of the Parliament Act, 1911. as amended by 1949 Act

Should the judicial proceeding of impeachment ever be resorted to, then, assuming no constitutional changes, the Peers would exercise the function of judges, both of fact and law, of the accusations made by the Commons. The last case of impeachment was that of Lord Melville (1805),[3] and impeachment may perhaps be regarded as obsolete. In any event, this function cannot be regarded as one of the everyday functions of the House of Lords.

Bearing in mind what has already been said, it may be asked why the House of Lords should be reformed. The main reasons are (1) the composition of the House is greatly in need of an overhaul[4]; and (2) the need to put proper restraints on Cabinet dictatorship.

[3] 29 St. Tr. 549.

[4] The preamble to the Parliament Act, 1911, recites the intention 'to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis'.

The problem of reform of the House of Lords is an old one. It is just over sixty-three years ago that the then Earl of Rosebery on June 20, 1884, moved 'That a Select Committee be appointed to consider the best means of promoting the efficiency of this House', *i.e.* the House of Lords. In the course of his speech he mentioned that the House of Lords had never appointed a committee to inquire into its own general condition, although it had at that time existed for about six centuries. He referred to the great changes which had taken place in the great and growing power of the House of Commons; the enormous increase of the constituencies which elected the House of Commons; the vast increase in the population of the United Kingdom; and, what did not exist at the time of the inception of the House of Lords, a newspaper press, and a colonial empire. All these changes, he said, showed that he had made a *prima facie* case why an institution of antiquity should require, if not reconstruction, if not new machinery, at least a slight readjustment, and some repair. Since 1884 much of the power of the House of Commons has become vested in the Cabinet, which has acquired an ascendancy over Parliament. According to general ideas, Parliament is supreme, and Ministers of the Crown are subject to parliamentary control. That, of course, is true, but it is only part of the story. What has become of great constitutional importance is the power of the political party organisations. The patronage of the party organisation has taken the place of the patronage which formerly belonged in very great measure to the peers, so that the House of Commons is still not a fully representative body. Most Members of Parliament are nominee members. Before being adopted as parliamentary candidates they have to be approved by the central organisation of the Party, and having become Members of Parliament they are subject to the strict discipline imposed by the Party Executive, and must vote as directed and not in accordance with their conscience. As Mr. Bonar Law said in the House of Commons on March 14, 1913: 'It is the tightness of party machinery which is the cause of one of the greatest evils of the present day. The result of our system is that if great Parliamentary Bills cannot be forced through with decent debate, they have to be forced through without it'. In my submission a Member of Parliament should be allowed to have the courage of his convic-

tions and be sufficiently independent of all persons, other than his constituents, to be able to voice his convictions without running any undue risk of losing his parliamentary seat because his views and opinions were not agreeable to such other persons. A great number of constitutional reforms will have to be carried out if the character of the House of Commons is to be that envisaged by Edmund Burke (1770), *viz.* 'The virtue, spirit, and essence of a House of Commons consists in its being the express image of the feelings of the nation. It was not instituted to be a control upon the people, as of late it has been taught by a doctrine of the most pernicious tendency, but as a control for the people'. The aristocrats of a century ago wielded power, and loved it. Substitute the Cabinet for the aristocrats and, in my view, one has the modern constitutional position, with this vital difference, that however much they may have wished to do so, the nineteenth century aristocrats did not wield such despotic power as does the twentieth century Cabinet. If any one disagrees with that view, may I suggest that he reminds himself of the provisions of the Supplies & Services (Extended Purposes) Act, 1947. He should also try to answer the question how it was that his representative in the House of Commons came to be adopted for his constituency and to what extent an individual elector had a say in such adoption.

In addition to rigid party discipline, no parliamentary time is now given for consideration of private members' Bills. The only Bills that now reach the statute book are Government-sponsored Bills. In the course of their passage to the statute book they receive as little, or as much, discussion as the Government decides, and if recent experiences are a sound guide, then it would seem that modern Governments are not in favour of too much parliamentary discussion. The Government having made up their minds, nothing remains to be doné but to use Parliament as a rubber stamp for the purpose of giving constitutional validity to the decisions arrived at by the Government after discussions at, *e.g.,* Cabinet meetings and party conferences, and with officials—discussions anywhere but in Parliament. The parliamentary devices of (a) the closure, which was first used in 1881 to overcome the obstructionist tactics of the Irish Nationalists and has existed in its present form since 1887; (b) the 'guillotine', which has existed since 1887; and (c) the

'kangaroo', which has existed since 1911; all three devices being used both in the House of Commons itself and in its Standing Committees; facilitate the Government's control of parliamentary time and of the House of Commons. Before the Second World War, private Members of Parliament were given some opportunity to introduce public Bills, but even then "... the interest a member naturally feels in either public or private legislative proposals ... may suffer if he proves recalcitrant to the orders of the whips. A private member has indeed a chance by the luck of the ballot to secure a second reading for a Bill, but, when it passes committee, it often has no chance of passing a third reading unless the Government will prove helpful ...".[5] The Parliamentary Secretary to the Treasury, *i.e.* the Chief Whip, 'advises the Prime Minister as to the best disposal of Parliamentary time in view of the programme of the Ministry and the attitude of members; it is he who conveys to the Prime Minister the strength of feeling regarding the grant of governmental time to allow of the passing of' a public Bill introduced by a private Member.[6] In 1937 Sir (then Mr.) Alan Herbert was successful in the ballot, and he introduced the Matrimonial Causes Bill. This Bill lost by an accident its normal chance of passing without special concession by the Government, but as Sir Alan Herbert was *persona grata* to the Government, his Bill received its chance through governmental favour, and it reached the statute book, being the Matrimonial Causes Act, 1937. It is clear that the Government, even before September 1939, possessed all the means for full control. At the present time it would be impossible for Sir Alan Herbert, or any other private Member, to introduce any Bill, for, as already mentioned, no parliamentary time is allotted for such purpose. All these matters and things have made the party leaders dictators, and dictators of the whole community, including that is, those electors who, because of the grave shortcomings of the existing electoral system, are without any real representation in the House of Commons.

Constitutional reform should begin with two things: First, the electoral system, with a view to ensuring that all electors are represented in the House of Commons. Secondly, the position

[5] *The British Cabinet System*, 1830–1938, by Professor A. B. Keith (1939), p. 267.
[6] *Ibid.*, pp. 246–247.

of the Member of Parliament, with a view to securing his independence from the party machine and consequently the party leaders. The reform of the House of Commons is more imperative than the reform of the House of Lords, but as there seems to be little hope of this, then any one who gives serious thought to the matter must come to the conclusion that the House of Lords must be reformed with a view to achieving a proper constitutional balance. Present social and political conditions demand that the reform of the House of Lords should become a reality, but not because the present House of Lords constitutes a threat to our parliamentary system, but in order to enable it to play a more effective role in achieving a democratic way of life.

The problem is, as Viscount Bryce said in the House of Lords on March 21, 1921, a double one. 'It is a problem of the powers which have to be given to the reconstituted House, and of the method of constituting that House. These two questions are closely inter-connected . . . there is no use in having a Second Chamber unless you give it substantial powers; but it is to be remembered that the more powers you give the more popular must be the composition of the Chamber. You will not succeed in having any considerable powers allotted to a Second Chamber unless there is a considerable popular element in the composition of the Chamber, in order to make sure that it represents adequately what I may call the best deliberate, popular sentiment'. That is sound advice and guidance, and has been kept in mind when formulating the proposals for reform now about to be put forward.

Taking the second problem first, namely the question of composition, the following proposals are put forward for consideration:

1. As the functions of the reconstituted House I have in mind do not, as will be seen later, include the judicial function, there would be no necessity for the nine Lords of Appeal in Ordinary to sit in the House of Lords as such, and that category of membership would be abolished.

2. I think the time has come for the disestablishment of the Church of England, which should carry with it the right for the Church to nominate its own bishops in lieu of the present right of patronage vested in the Prime Minister. But whether the

Church of England is disestablished or not, its privileged position in the Legislature should end. The proportion of suitable legislators in other denominations is as high as it is in the Church of England, and in my submission it is wrong that a holder of ecclesiastical office should, *ex officio,* have a right to membership of the Upper House. A man may be a good bishop but a bad legislator.[7]

3. By eliminating the Lords Spiritual and the Law Lords we are left with the temporal peers. And it is here that the real difficulty arises. It must be remembered that a peer, because he is a peer, has not the parliamentary vote, and is not entitled to be elected a member of the House of Commons. But he is a citizen, and pays rates and taxes to the same extent as he would do if he were a commoner, and obviously he must be entitled to political representation in one or other of the two Houses of Parliament. My proposal is that the present system of election applying to the hereditary peers of Scotland should be extended to cover *all* hereditary peerages now existing, the number to be elected to be, say, 100. In other words, the holders for the time being of the existing 1,000 or so temporal peerages would elect 100 from their own number to represent them for each Parliament, these 100 having the right to sit and vote in the reconstituted Chamber. The holder for the time being of an existing temporal peerage would also be given the right to renounce the privileges of peerage so far as he personally is concerned, this renunciation having to be made not later, say, than seven days before nomination day of parliamentary candidates at the first General Election to be held after the reconstituted Chamber comes into existence, or, in the case of future holders of the title, before nomination day of parliamentary candidates at the first General Election to be held after succeeding to the title.[8] His election would be binding on him for the rest of his life. To

[7] The Bill introduced by Lord Salisbury in December, 1933, contemplated the reduction of spiritual peers to the archbishops and three bishops. See *Ridge's Constitutional Law of England,* 6th ed., by Professor A. B. Keith, p. 76, footnote (a).

[8] An Irish peer, unless he has been previously elected to sit in the House of Lords, may stand as a candidate for any parliamentary constituency in Great Britain. The present Earl Winterton is an Irish peer but a member of the House of Commons. Once, however, an Irish peer has been elected to sit in the Commons he is no longer entitled to his privileges as a peer or to be elected as a representative peer of Ireland or vote at an election of such peers.

give an illustration. Assume that there is such a peerage as the Earldom of Blanktown in existence at the date of creation of the reconstituted Chamber. The Earl of Blanktown at that date (assuming he is under no legal disqualification at that time) would have the right, before the date just indicated, to renounce the privileges of peerage, and if he did so he, personally, would never have the right to be elected a representative peer, but he would be entitled to be elected a Member of the House of Commons. On his death his successor would have a similar right. If he preferred the Upper House to the Lower, then he, personally, would never have the right to be elected a Member of the House of Commons, but he could be elected by his fellow peers as a member of the Upper House. Of course, he might never receive their approval, and in that event he would share the fate of the parliamentary candidate who never gets the winning approval of any constituency. And this would be the procedure until the Earldom of Blanktown should become extinct. For every five temporal peers who elected to renounce the rights of peerage, the number of 100 would be reduced by 1. In the case where the holder for the time being of the peerage was under a legal disability (*e.g.* under full age) the relevant General Election in his case would be the first one to be held after the legal disability had ended. The figure of 100 would also be reduced by one for every five peerages that became extinct. In course of time (but most probably not for a long time) this representation in the Upper House would end through 500 of the existing temporal peerages having become extinct. Should any temporal peerage still be subsisting at that date, then its holder should, from the point of view of parliamentary representation, be in exactly the same position as a commoner.

4. Peeresses in their own right should be entitled to representation in the proportion of, say, one for every five of their number.

5. My next proposal is that the law should be altered (1) to prohibit the creation of any more hereditary peerages other than dukedoms for members of the Royal Family, the holders of which should be *legally* entitled to sit and vote in the Upper Chamber, but who should observe the constitutional convention not to indulge in politics; and (2) to allow of the creation of, say, 150 members, these persons to have the right to sit and vote

in the Upper Chamber for fifteen years, *i.e.* the total legal lives of three Parliaments, one-third retiring every five years. They would be persons of personal eminence in some walk of life, and would be nominated not by the Prime Minister but by a permanent Selection Committee. It is suggested that the following ten persons should be *ex officio* members of the Selection Committee, *viz.* the Lord Chancellor, Mr. Speaker, the Prime Minister, the Leader of the Opposition, the Chairman of the Bar Council, the Presidents of the Royal Academy, Royal Society, Law Society, Royal College of Physicians, and the Royal College of Surgeons. In addition to these ten *ex officio* members, it is suggested that there should be three members of each of the two Houses of Parliament, elected by the members of their own House; three members to represent the various churches and religious denominations in the United Kingdom, elected by those Bodies; two of the Vice-Chancellors of the universities of the United Kingdom, elected by all the Vice-Chancellors of all those universities; and the following Bodies one representative each, *viz.*

County Councils and County Boroughs;
Boroughs;
T.U.C.;
Federation of British Industries;
Recognised professions of Accountants (*e.g.* the Chartered and Incorporated Bodies);
Recognised professions of Chartered Architects and Surveyors;
Chambers of Commerce in the United Kingdom;

and the Committee itself should have the right to elect three members from any walk of life. This would make a permanent membership of thirty-one. The elected members should be members for three years and should be eligible for re-election. The Selection Committee should have full power to seek outside assistance in considering nominations, and no member of the Selection Committee should, because of such membership, be precluded from making nominations, or being nominated.

In putting forward the proposal of a Selection Committee the experience of the Senate in Canada has been kept in mind. The intention at the time the Canadian Federation was created was that the Senators should be men of substance, of personal

eminence, and independent of outside influence. To achieve that a property qualification was imposed, and they are appointed for life, and are paid a salary. Recommendations are made by the Canadian Prime Minister, and most Canadian Prime Ministers have looked upon the Senate as a preserve for their own supporters. As Sir Wilfrid Laurier, the then Prime Minister, said in 1911, 'I have heard it said, "Why does not the Governor select Senators from the different political parties?" I have only to say that the Government is composed of men who are very human'.[9] Sir Wilfrid Laurier was so human that in the course of his career he made eighty-one appointments to the Senate, all of whom were his own supporters. Frankly, I think that our own Governments would be just as human, and as the intention is that these 150 members shall be relieved of such obligations as personal gratitude to the Prime Minister and political party allegiance, their recommendation must be made, *e.g.*, by an independent committee of reasonable size and fairly representative of the United Kingdom as a whole. My own view is that no property qualification should be required—there are many persons of personal eminence but with very little else! But there should be an age qualification—no person under the age of, say, thirty years should be eligible for nomination. Women should be on exactly the same footing as men, as it would be intolerable to make any distinction merely on account of sex.

6. The Prime Minister would be given the right to nominate, say, fifty members for each Parliament. This would enable the views of the Government to be adequately presented in the Upper House, coupled with the further right that Ministers of the Crown should have a right to speak in both Houses.

7. Each of the eight Dominions should have, say, one member, while the Colonies should have the same total numerical representation as the Dominions, they apportioning their representation in such manner as they themselves shall decide.

8. Every member of the reconstituted House should be paid an annual sum for parliamentary expenses, which sum should be free of all taxes. As a member's expenses presumably would not be as great as those of a Member of Parliament, it is suggested that the annual sum should be in the neighbourhood of

[9] *Canadian House of Commons Debates,* January 30, 1911, p. 2715.

£300 p.a. On May 21, 1947 the House of Lords agreed to a motion that those peers in regular attendance in the House should be entitled to recover the cost of railway fares incurred in respect of their duties. My own view is that members of the reconstituted House should receive more than their railway fares. With regard to the question whether a member should receive a salary, it is suggested that no member should be entitled to a salary as of right, but that if the Selection Committee were satisfied that in any particular case the financial position of the member justified the payment of a salary, then they should have power to award him a salary up to but not exceeding the amount of salary for the time being payable to Members of Parliament, the £300 for expenses to be taken into account. Any such salary should be a direct charge on the Consolidated Fund. The desire is that membership of the Upper House should be a real honour, but that no suitable person should be unable to accept the honour because of lack of financial means.

9. So far as disqualifications are concerned, it is suggested that the existing disqualifications for bankruptcy and imprisonment for felony should remain, and that the right of a peer to try and be tried by his fellow peers for treason or felony or misprision of either should be abolished, all persons, of whatever status, being amenable to the jurisdiction of the same courts.

10. The privileges of the reconstituted Chamber should consist of freedom of speech, freedom of access to the Sovereign for each member individually, the same right to commit for contempt as the House of Commons, *i.e.* the imprisoned person being set free immediately Parliament is prorogued; and the right to exclude disqualified persons from taking part in the proceedings of the House.

To sum up, the suggested reconstituted House would thus have a maximum membership of 316, which is approximately one-half of the membership of the House of Commons, and is not, it is submitted, an unreasonable number. It is interesting to note in this connection that the Australian Constitution specifically enacts that the number of the members of the Australian House of Representatives shall always be 'as nearly as possible twice the number of the Senators', and the House of Commons of Northern Ireland is twice the size of the Senate (52 to 26). Men and women would have equal rights, and members would have

no unreasonable privileges. The Dominions and the Colonial Empire would have direct representation. Such a House, it is thought, would meet the view of Viscount Bryce that it should represent adequately 'the best deliberate, popular sentiment' and would, at the same time, treat the present hereditary peers in a fair manner. It would be a Chamber possessed of a considerable measure of moral and intellectual authority, and not governed by party feeling or subservient to party organisation, and on that basis it would be entitled to substantial powers.[10]

Before discussing the powers or functions of the reconstituted House, it should be pointed out that it is not desired in any way to give the House the power of controlling executive policy. That must remain with the House of Commons.

Now in 1917–1918 a Conference on the Reform of the Second Chamber was held under the chairmanship of Viscount Bryce. There were thirty members representing all the political parties and drawn equally from the two Houses of Parliament. There was general agreement amongst the members of the Conference that the functions of a Second Chamber are[11]:—

'1. The examination and revision of Bills brought from the House of Commons, a function which has become more needed since, on many occasions during the last thirty years, the House of Commons has been obliged to act under special rules limiting debate.

'2. The initiation of Bills dealing with subjects of a practically non-controversial character which may have an easier passage through the House of Commons if they have been fully discussed and put into a well-considered shape before being submitted to it.

'3. The interposition of so much delay (and no more) in the passing of a Bill into law as may be needed to enable the opinion of the nation to be adequately expressed upon it. This would be specially needed as regards Bills which affect the fundamentals of the Constitution or introduce new principles of legislation, or which raise issues whereon the opinion of the country may appear to be almost equally divided.

[10] The composition of the Upper House proposed by the Conference presided over by Lord Bryce, referred to below, was based on election of 246 members by the House of Commons in thirteen groups and eighty-one peers (to be reduced to thirty) chosen by committees of five of the two Houses.

[11] See p. 4 of Lord Bryce's Letter on the results of the Conference, cd. 9038 (1918).

'4. Full and free discussion of large and important questions, such as those of foreign policy, at moments when the House of Commons may happen to be so much occupied that it cannot find sufficient time for them. Such discussions may often be all the more useful if conducted in an assembly whose debates and divisions do not involve the fate of the executive Government'.

It will be observed that these functions are those usually given to an Upper Chamber, and do not include the judicial function. They are reasonable, and as a reformed Court of Appeal should be able to perform efficiently the functions of a final Court of Appeal, these factors account for the view already expressed that the office of Lord of Appeal in Ordinary should be abolished.

Dealing seriatim with these functions.

1. Another thirty years have passed since Viscount Bryce penned his letter, and what was true then of the House of Commons being obliged to act under special rules limiting debate is far truer today. One has only to think of what happened in connection with the Transport Act, 1947.

2. This is a useful function, for the present existence of which the House of Commons should be grateful, and it is one which should undoubtedly be given to the reconstituted Chamber.

3. This is the most controversial, and by far the most important, function. The vital question is, What is a reasonable period to allow for the opinion of the country to be adequately expressed? The Parliament Act, 1911, provides for a suspending power of two years for ordinary Bills, and one month for Money Bills. My own view is that the two world wars have so altered conditions that two years is now too long a period and that one year is more reasonable. But I dislike the idea of the reconstituted Second Chamber being reduced to a nullity after the expiration of the specified period, and it is suggested, therefore, that if after the expiration of the specified period the disagreement between the two Houses still persists, then the Lord Speaker and Mr. Speaker should be under a duty to convene a joint sitting of the members of the two Houses, the issue being decided by a simple majority vote. The vote should be a 'free vote', *i.e.* every member of the House of Commons should be free of the Party Whips. The omission of the King as the con-

vener of the Joint Sitting is deliberate, as it is thought to be unfair to involve him in any way in the disagreement which had made the Joint Sitting essential.

As regards Money Bills, no one, of course, can possibly question the impartiality of Mr. Speaker, but I am strongly opposed to any one person having absolute power. And that is what Mr. Speaker was given by the Parliament Act, 1911, as regards Money Bills. The power should be vested in a Joint Committee consisting of four members of the House of Commons, and a similar number of the reconstituted House, Mr. Speaker being *ex officio* Chairman of the Joint Committee and having a casting vote. This Joint Committee should be appointed at the beginning of every new Parliament.

Other proposals for reform have been made. Thus, a Select Committee of the House of Lords set up by Lord Rosebery in 1908 reported against the principle that mere possession of a hereditary peerage should confer the right to a summons to the Upper House. Lord Lansdowne made proposals in 1911, including one which would have limited the prerogative of the Crown to creating not more than five new peerages in any year, and there were Governmental resolutions in 1922,[12] 1925, and 'more seriously in 1927 [13] when the issues were mainly the question of safeguarding the people against social revolution under guise of financial legislation, and that of requiring a referendum on any fundamental constitutional change'.[14] The view expressed in 1933 by Sir Stafford Cripps, the present Chancellor of the Exchequer, that the Labour Party should only take office on a royal promise to override any attempt of the Lords to delay the extinction of capitalism by Orders-in-Council under an Emergency Powers Act led to Lord Salisbury introducing a Bill in December 1933 limiting the members of the House of Lords to 300 (150 chosen by some mode of election, and 150 peers elected by the peers).[15] The Labour Party at one time were in favour of complete abolition of the Upper House, but public statements of certain of the present leaders of

[12] 51 H.L. Deb. 5 s. 524–572, 642–682, 783–815, 963–996; 52 H.L. Deb. 261–288.
[13] 57 H.L. Deb. 5 s. 755–802, 862–950, 952–1006; 58 H.L. Deb. 664–667; 208 H.C. Deb. 5 s. 1285–1406.
[14] *Ridge's Constitutional Law of England* (*supra*), p. 75.
[15] *Ibid.*, p. 76.

that Party indicate that total abolition may no longer be part of the official policy of the Party. The Bill introduced by the present Government in 1947, and which has passed through all its stages in the House of Commons, contemplates the cutting down to one year of the suspending power of two years possessed by the Upper House in respect of all Bills (other than Money Bills) under the Parliament Act, 1911. Unofficial negotiations are at the moment being conducted between the Government and representatives of the Peers to see if it is possible to devise an agreed scheme for the reform of the Upper House.

As the present Master of the Rolls (Lord Greene) pointed out when delivering the Thirteenth Haldane Memorial Lecture at Birkbeck College, London University, on October 19, 1944, 'The constitutional machinery . . . is the mechanism through which the wishes of the people in a democratic community are given effect'. I will conclude this lecture by asking every thinking person to bear in mind the following views of Lord Greene, *viz.* 'Upon the effectiveness of that machinery (*i.e.* the constitutional machinery), its elasticity, its capacity for development and change, the success of a democratic system depends. The machinery must be up-to-date, old parts must be replaced by new, new devices must be added to meet new problems, old devices which have ceased to achieve the results required must be modified or eliminated. Unceasing vigilance must be maintained in order to be sure that no bearing is becoming hot, that no part of the engine is being subjected to a strain which may lead to a breakdown'. When formulating my proposals I attempted to meet these views. I well realise that I have not completely succeeded, but I trust I have not seriously deviated from the path his Lordship indicated, as I feel that that is the path one should follow.

The lecture on which this paper is based was delivered in the Eugenics Theatre of University College, and the following amusing paragraph appeared in the *Daily Herald* newspaper dated October 31, 1947,

'The hard way.

'From yesterday's list of engagements: University College. Mr. R. C. FitzGerald on "The House of Lords and its Reform". Eugenics Theatre.

'Something rather interesting, of course, could be done along those lines. But wouldn't it be rather drastic?'

6

MINISTERS' POWERS AND THE COURTS

D. Lloyd

One of the characters, you may recall, in W. S. Gilbert's *Iolanthe* muses on the strange trick of Nature which contrives that every boy or girl born into the world is either a little Liberal or else a little Conservative. Accepting these labels as broadly descriptive of two differing outlooks on the meaning and purpose of government, it will probably be agreed that Gilbert, in his whimsical way, has placed his finger on one of the basic divisions which have overshadowed and diversified human affairs ever since they have been organised in some semblance of a political society. Whether the conflict be between Cleon and Pericles, Gladstone and Disraeli, or Mr. Attlee and Mr. Churchill, it is there ineradically in past and present for all to see. No doubt every age reshapes the problem in its own special image, and that image has to be thought out and fought over anew with all the resources and prejudices of the particular period of civilisation. A mere lawyer, however, is hardly required or expected to venture deeper into such profound questions as the fundamental nature of man's civilisation and its development—these broad and fascinating matters are more appropriately left to the historians and to the philosophers. I am emboldened simply to take a glance at that distant horizon, because I think it provides the background against which the special topic dealt with in this paper can alone be brought into some sort of focus. All law, no doubt, has some political and social elements—even such forbidding and inscrutable topics as the rule in Shelley's Case, or the doctrine of contingent reminders. Still, my topic is a subject where the association of law and politics is a great deal more apparent—indeed, it may even be termed a kind of no-man's-land between the two spheres where the lawyer, faced with the necessity of practical solutions, is forced to find them as best he may, amid the sniping, not to say cannonades and atomic bom-

bardments, of those located in the opposing trenches. Perhaps this is an exaggeration, but it may serve to remind you that it is upon the lawyers—and by the lawyers, I mean the courts—that the responsibility ultimately devolves of holding the scales between the Executive and the People, in so far as the people's rights are embodied and are capable of embodiment in rules of law.

You will need no reminding that the State has travelled far from the days when Locke could comfortably define its functions as the protection and security of property. Today, the State presents itself in the contrasting guise of a many-headed Leviathan to those who resist, or as a bountiful many-handed deity to those who approve its manifold and ever-increasing activities. Some elements of comparison—for nothing is new under the sun—are doubtless to be found in the past: the spate of social legislation (including delegated Orders) and the encroachment of executive tribunals on the ordinary courts are well-known characteristics of the Tudor era. None the less, it remains true that the present age is unique, in English history at least, in its emphasis on executive decrees and administrative tribunals. But whatever our political complexion may be, whether deepest blue or fiery red, or of whatever intermediate shade, it can hardly be denied that though recent events may have accentuated the development, it has been going on now for a very long time, and has not—notwithstanding Dicey—gone unobserved either by legal writers, the practising profession, or His Majesty's judges. In 1911—by which date I think I am right in saying Professor Dicey's famous treatise had attained its seventh edition—Farwell, L.J., made this judicial utterance in the course of a leading case: 'The convenience in the public interest is all in favour of providing a speedy and easy access to the Courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers by Government departments and Government officials, having regard to their growing tendency to claim the right to act without regard to legal principles and without appeal to any Court. . . . If ministerial responsibility were more than the mere shadow of a name, the matter would be less important, but as it is, the Courts are the only defence of the liberty of the subject against departmental aggression'.[1]

[1] *Dyson* v. *Attorney-General* (1911), 1 K.B. 410, at pp. 423–424.

Strong words, and they may be taken as expressive of that school of thought representing one side of the division of which I have spoken: the view which envisages the courts as struggling —though only with partial success—to resist the ever-encroaching power of an executive, which has increased, is increasing, and ought to be diminished. 'As was to be expected' (writes Dr. C. K. Allen in his recent distinguished onslaught on executive powers) 'it was the Judges who saw what was happening, for theirs was peculiarly the task to be vigilant about the constitutional principles of which they were the guardians'.[2] And in another passage he asserts: '. . . They [the Judges] have constantly protested, as it was their duty to do, against taking from their hands the means of providing that protection [of the individual against the State]'.[3]

That then is one side of the picture, and I cannot illustrate it more fully in the time at my disposal. I respectfully select as advocate of the reverse side the views of that eminent constitutional lawyer, Sir Ivor Jennings, who, writing in 1934, expressed the argument thus: 'That a highly individualistic and conservative profession like the English legal profession should regard with some suspicion the development of a vast collectivist administrative law is to be expected. . . . There is certainly no evidence in England of a deliberate misuse by the Courts of their control powers. . . . What does appear is that the common law itself is biased against administration, and that on occasions judges have, without in any way offending against the law, used that bias in such a way as to impede the administrative machine.[4] The judges', he adds, 'in recent years have been unconsciously led by social conditions to exhibit a bias against social reform'.[5] And elsewhere he asserts that: 'The Courts will not easily be persuaded to regard themselves as deprived of jurisdiction'.[6]

Thus the issue stands fairly joined. On the one hand we see the great Juggernaut of the State bearing down on the subject, ready and able to crush him and his rights and privileges out of

[2] *Law and Orders*, p. 30.
[3] *Ibid.*, p. 285. See also Lord Hewart, *New Despotism*, pp. 102–103.
[4] 49 *Harvard Law Review*, pp. 434–435. 'Almost, the Common Law was born to resist'. (H. Finer, *Theory and Practice of Modern Government*, Vol. 1, p. 179.)
[5] 49 *Harvard Law Review*, p. 452.
[6] *The Law and the Constitution* (1933 ed.), p. 225.

existence, while the courts alone stand across the path of this mighty Engine, seeking by all the resources they can command to succour those who have the misfortune to fall in the way of its irresistible advance (I avoid the word 'progress'). On the other hand we are presented with a life-giving and beneficent State, armed with an elaborate programme of social reform for all its members, but from time to time frustrated—though not deliberately—in this objective by the lack of vision of the ordinary courts in their administration of the law. Plainly the courts have to embark upon a dangerous piece of navigation if they are to avoid being devoured by the Scylla of executive omnipotence, and also to escape consignment to the whirlpool of Charybdis, which one feels would assuredly be their ultimate fate, if, as Sir Ivor Jennings thinks, they are—albeit only unconsciously—setting at naught the will of the people as embodied in their duly-elected representatives. It will therefore be my endeavour to put before you in this paper some of the material which needs to be considered in order to assess which (if either) of these two viewpoints truly represents the current attitude of our courts towards ministerial powers.

At first sight, it might seem that for courts which acknowledge the sovereignty of Parliament in its full Austinian rigour, the problem is a comparatively simple one. In modern times, almost all the special powers and functions conferred on the executive are derived from statute, and, therefore, it may be said that all the courts have to do is to apply the particular enactment that is before them. You will not, however, need any persuading that though this cardinal principle may be a starting point, it is no more than a starting point. No modern judge would take it upon himself to assert, as Sir Edward Coke once asserted, that 'the Common Law will control acts of Parliament and sometimes adjudge them to be utterly void'.[7] But a statute, however solemn its binding character, is, after all, only a document consisting of words, and as words—at any rate in English statutes—are seldom self-explanatory, they have to be construed, so that in fact the interpretative faculty of the judge becomes a very vital element in their application.[8] This is not to

[7] *Bonham's Case,* 8 Rep. 118.

[8] 'The law has no eyes: the law has no hands: the law is nothing, nothing but a piece of paper printed by the King's printer, with the

say that our courts pay mere lip-service to the doctrine of parliamentary supremacy—far from it—but still we cannot be unmindful of the fact that the lawyer, if not adept at cutting Gordian knots, is also not without resources of his own—I need not remind you, for instance, of the legal fictions so dear to the common law in the course of its history.

The question then that arises for consideration is the extent to which the courts have undertaken to examine and adjudicate upon acts of the executive under powers conferred by statute. First, we must note that the courts have distinguished carefully between functions which are purely administrative or executive in character and those which are termed 'quasi-judicial'. Of administrative acts, where, that is, a statute has conferred an unfettered discretion, and the only question is, what is expedient for the public interest, it is settled that the courts will not interfere—this much at least of Montesquieu's separation of powers is to be found in the English constitution.[9] As Henn Collins, J., has observed: 'The Minister, acting in his administrative capacity, is governed by considerations of expediency only. He has to decide ultimately, I suppose, subject to the review and governance of Parliament what in his view is best for the community. No principle of natural justice as between any individual and the Minister of the Crown has any place in that kind of administration'.[10]

More difficulty has been experienced in defining and determining the limits of quasi-judicial functions. The courts have not considered the meaning of such functions very much in the abstract, but from an examination of the cases it seems that such a function arises where some true contest—the word 'lis' is the technical phrase usually employed—exists between the authority and a person aggrieved. In other words, there must be two sides between whom the Minister has to adjudicate upon consideration,[11] and he must then observe what are called the principles of 'natural justice'. How far this can be said to

King's arms at the top, till public opinion breathes the breath of life into the dead letter'. (Macaulay, *Speech on Parliamentary Reform*, Oct. 10, 1831.) And of that public opinion the courts are both, to some extent, an organ and an integral element.

9 See *e.g. Robins Ltd.* v. *Minister of Health* (1939), 1 K.B. 520.

10 *Miller* v. *Minister of Health* (1946), 1 K.B. 626, at p. 628.

11 Per Maugham, L.J., in *Errington* v. *Minister of Health* (1935), 1 K.B. 249, at p. 271.

impose a real fetter upon his discretion will, I hope, emerge to some extent from what follows.[12]

Of the earlier cases, which are very numerous, I can refer now only to a single one: a decision of Swift, J., in 1937. I venture, however, to cite it as not unrepresentative of the pre-war current of authority.[13] In that case the Minister of Health had confirmed a clearance order under the Housing Act, 1936, and the property-owner moved to quash it on the ground that there was no evidence before the Minister on which he could have confirmed the order. Swift, J., held that as the Minister had complied with the provisions of the Act, this matter could not be gone into by the court. 'I have been invited', said the learned judge, 'to say that there was no evidence before the Minister, but it is not for me to consider whether there was or was not. He had to comply with the Act of Parliament. A proper order has been sent up to him, and he has ordered a proper inquiry to be made, which has been made, and he has got the report, and it was for him to decide whether or not to confirm it. In my view, it is not for this Court to interfere with his decision. Having been invited to say that there is no evidence, I cannot resist *en passant* saying that, to my mind, it was an overwhelming case of horrid slums, which ought to be quickly cleared away'.[14] You may, incidentally, care to bear this last dictum in mind, in considering the suggestion of bias against social reform which some have detected in our courts.[15]

Turning now to the post-war decisions, there have recently been a number of cases reported in which the courts have had to consider the grounds on which they are entitled to intervene,

[12] On the very limited construction placed by the courts on the principles of 'natural justice', see *Local Government Board* v. *Arlidge*, [1915] A.C. 120 (especially per Lord Shaw, at p. 138).

[13] *Re Falmouth Clearance*, [*1936*] *Order* (1937), 3 All E.R. 307. Cf. *Re Bowman* (1932), 2 K.B. 621.

[14] *Re Falmouth Clearance*, [*1936*] *Order* (*supra*), at p. 312.

[15] In *Errington* v. *Minister of Health* (*supra*) the Court of Appeal quashed a clearance order where the Minister had received communications from the local authority which were not disclosed to the objectors. This case, however, was distinguished in *Frost* v. *Minister of Health* (1935), 1 K.B. 286, and *Horn* v. *Minister of Health* (1937), 1 K.B. 164. See also *Re Manchester etc. C.P.O.* (1935), 153 L.T. 219; *Offer* v. *Minister of Health* (1936), 1 K.B. 40; *Fredman* v. *Minister of Health* (1936), 154 L.T. 240; *Donby Ltd.* v. *Minister of Health* (1936), 1 K.B. 337; *Robins Ltd.* v. *Minister of Health* (*supra*) in all of which the Minister was upheld.

where application is made to quash compulsory purchase orders confirmed by a Minister under his statutory powers. Of these decisions the most important, and the only one to which I can now refer, is *Johnson & Co. Ltd.* v. *Minister of Health* decided by the Court of Appeal in 1947.[16] In that case a local authority applied to the Minister for confirmation of a compulsory purchase order, and thereafter in two letters to the Ministry, neither of which was disclosed to the owners, the local authority stated that negotiations for a voluntary sale had failed, and that the owners were a firm of speculative builders. It will be realised that this latter statement, if not actually defamatory, was at least intended to be depreciatory of the owners. Moreover, no negotiations for a voluntary sale had ever in fact taken place. At the time those letters were written the local authority apparently knew that the owners were objecting, but formal objections were not and could not have been filed at that stage. The Minister confirmed the order, and the Court of Appeal subsequently upheld his confirmation. Lord Greene, M.R., noted the fallacy of assuming that there was ever a 'lis inter partes' in such matters comparable with ordinary litigation. 'On the substantive matter, *viz.*, whether the order should be confirmed or not, there is a third party who is not present, *viz.*, the public, and it is the function of the Minister to consider the rights and interests of the public. . . . It may well be that, on considering the objections the Minister may find that they are reasonable and that the facts alleged in them are true, but nevertheless he may decide that he will overrule them. . . . His views on that matter he must, if necessary, defend in Parliament, but he cannot be called on to defend them in the courts'.[17] 'Moreover the Minister', continued the learned Master of the Rolls, 'is entitled to have his mind informed in a number of ways. . . . It is obvious to any one who has any familiarity with the operations of Government departments that matters of high public policy, such as this, are, or may be, under constant consideration and review by the necessary Minister. . . . It is not unfair to say that,

[16] (1947), 2 All E.R. 395. See also *Stafford* v. *Minister of Health* (1946), 1 K.B. 621; *Miller* v. *Minister of Health* (1946), 1 K.B. 626; *Price* v. *Minister of Health* (1947), 1 All E.R. 47; *Summers* v. *Minister of Health* (1947), 1 All E.R. 184. And cf. *Green* v. *Minister of Health* (1947), 2 All E.R. 469.

[17] *Johnson & Co. Ltd.* v. *Minister of Health* (*supra*) at p. 399.

generally speaking, the idea that a Minister can be compelled to disclose to anybody information . . . which he has obtained as an administrative person, is alien to our whole conception of government in this country'.[18]

In short, the Court of Appeal laid it down that a very restricted ambit must be given to the Minister's quasi-judicial functions, and that in any event no 'lis' can arise until formal objections to the order have been filed. Consequently the Minister was under no duty to disclose any document or matter whatsoever, however prejudicial it might be to the landowner, which the Minister received or was informed of before notice of objection.

The power of judicial review over executive and quasi-judicial functions has, of course, many aspects, but time will permit me only to put before you one further illustration. It is, however, one which has caused much heartburning in some quarters and has featured prominently in the last few months in two reported decisions (I say nothing of the popular press), one of which reached the House of Lords, and the other the Court of Appeal. You will need no reminding that, in 1942, at a period, I suppose, as critical as any in our history, the House of Lords was called upon to consider the construction of the well-known (or should I say 'notorious'?) Regulation 18b of the Defence Regulations, which provided that the Secretary of State could direct any person to be detained if he had 'reasonable cause to believe' that by reason of his hostile associations or other similar grounds, it was necessary to exercise control over him. The case, as you know, was *Liversidge* v. *Anderson*,[19] and the highest tribunal, affirming the previous decisions of the Court of Appeal and the King's Bench Division, held that they were not entitled to apply an objective test to the words 'reasonable cause' as employed in the regulation: on the contrary, the test was purely subjective, and it was enough for the Secretary of State to declare that he had reasonable grounds, and no court could inquire into their sufficiency. Lord Atkin, in the course of a very powerful dissenting speech, used these words: 'I view with apprehension the attitude of judges who, on a mere question of construction, when face to face with claims involving the

[18] *Johnson & Co. Ltd.* v. *Minister of Health* (*supra*) at p. 401.
[19] [1942] A.C. 206.

liberty of the subject, show themselves more executive minded than the executive '.[20] Lord Atkin's view, however, did not commend itself to the other learned law lords. ' At a time ', said Lord Macmillan, ' when it is the undoubted law of the land that a citizen may by conscription or requisition be compelled to give up his life and all that he possesses for his country's cause, it may well be no matter for surprise that there should be confided in the Secretary of State a discretionary power of enforcing the relatively mild precaution of detention '.[21] And Lord Wright observed that ' the Court has no jurisdiction to sit as an appellate tribunal on any decision of the Home Secretary '.[22]

Now you will appreciate that the interest of this decision is not limited to cases arising under Regulation 18b or any analogous provision (if there ever be any in the future) or even to cases directly affecting the liberty of the subject, important though that aspect may be in the constitutional history of this country. You will bear in mind that there are many statutes in existence (and perhaps many more pending) which confer upon a Minister a discretionary power to make a certain order ' if he is satisfied ' that certain conditions obtain. You perceive the problem and its analogy with the Regulation 18b cases. Do such provisions confer upon the Minister an absolute executive discretion to decide whether an order is to be made, or have the courts any jurisdiction to examine into the sufficiency or otherwise of the grounds upon which the Minister has purported or declared himself to be satisfied? The importance of the construction arrived at requires no stressing either to the individual landowner whose land, for example, is to be compulsorily purchased by ministerial decree, or to the Minister himself, or the local authority whose carefully drawn-up schemes may be rendered abortive by a judicial ruling that the administrative orders made to implement those schemes are invalid. For instance, under s. 1 (1) of the Town and Country Planning Act,

[20] *Ibid.*, at p. 244.
[21] *Ibid.*, at p. 251.
[22] *Ibid.*, p. 261. Cf. Sir Pollock's comment to Mr. Justice Holmes on the *Halliday Case* in 1917: ' My private opinion is that there is no liberty of the subject in time of war within the realm '. (*Pollock-Holmes Letters*, I, 245.) It is noteworthy that in *Liversidge* v. *Anderson*, Lord Atkin alone of the nine judges seised of the matter, dissented from the construction adopted by all three tribunals. Cf. also *Green* v. *Secretary of State*, [1942] A.C. 284.

1944, the Minister of Town and Country Planning may, on the application of a local authority, make an order declaring an area to be subject to compulsory purchase, where he is satisfied that it is requisite, for the purpose of dealing satisfactorily with extensive war damage in the area, that land, which has suffered war damage, or that such land, with contiguous or adjacent land, should be laid out afresh and redeveloped as a whole. If objections are made to a proposed order, the Minister is bound to hold a local inquiry before deciding whether to make the order. In the first of the cases referred to, *Phœnix Assurance Co., Ltd.* v. *Minister of Town and Country Planning*,[23] the City Council of Plymouth had applied to the Minister for such an order relating to an area in the city which had suffered extensive war damage. The applicants' land lay within that area, but had not itself suffered any war damage. The plan of the council showed that they intended to leave the applicants' building substantially as it was, and it further appeared that what the local authority was in fact aiming at was to have the whole area, including the applicants' land, in one ownership and to take advantage of being able to buy more cheaply than in the open market. The Minister made the order, and in proceedings to quash it, the Attorney-General argued on his behalf that the Minister had a purely administrative discretion under the Act which could not be questioned in the courts. For the applicants it was argued that the Minister could not validly make the order unless he was reasonably satisfied as to all the matters laid down in s. 1 (1) in respect of each piece of property to which the order applied, and that there was no evidence on which he could be so satisfied. Henn Collins, J., rejected the Attorney-General's argument, and held that the discretion conferred by the Act was not of such a character as to preclude a court from inquiring into the grounds on which the Minister had so satisfied himself. The learned judge distinguished *Liversidge* v. *Anderson* (*supra*) on the ground that that was a decision based on ' a measure by way of preventing a public danger when the safety of the State is involved '.[24] Accordingly, as the applicants' land was not intended to be laid out afresh, Henn Collins, J., held that the order was beyond the Minister's jurisdiction and should be

[23] (1947), 1 All E.R. 454.
[24] *Ibid.*, at p. 457.

quashed. The matter, however, did not rest there. In the subsequent case of *Robinson* v. *Minister of Town & Country Planning* [25] where the facts were precisely similar, Henn Collins, J., applied his previous decision in the *Phœnix Case* and quashed the order. On appeal, the Court of Appeal unanimously reversed this decision and expressed disapproval of the *Phœnix Case,* which must now be taken to be overruled. Lord Greene, M.R., pointed out that though the local public inquiry had no doubt to be conducted on quasi-judicial principles, the making of the order itself was a purely executive act and in no way subject to such principles. 'The question is one of opinion and policy, matters which are peculiarly for the Minister himself to decide. No objective test is possible. . . . In exercising his discretion he cannot be confined to the evidence given at the inquiry. . . . He may have and is entitled to have present to his mind his own view as to general policy as well as material acquired in a purely executive capacity. . . .' [26] Somervell, L.J., referred to *Liversidge* v. *Anderson* (*supra*) and dissented from the view of the learned judge below that that decision was limited to cases where the safety of the State was involved (see at p. 862).

We come now to the '*Stevenage Case*', which, not unnaturally, has aroused a good deal of public interest. The facts, for our purposes, were comparatively simple. Under the New Towns Act, 1946, the Minister of Town and Country Planning has power to make an order for a 'new town' if 'satisfied that it is expedient in the national interest that any area of land should be developed as a new town'.[27] If objections are made to a proposed order, the Minister 'shall cause a public local inquiry to be held' and 'shall consider the report of the person by whom the inquiry was held' and thereafter he may make the order.[28] The Minister held a public local inquiry in respect of his proposed order for Stevenage, where the objections to the order were heard, but himself offered no evidence at the inquiry in support of the order. Before confirming the order the Minister dealt in writing with the substance of all the objections, except the difficulties relating to the water supply, as to which he stated that he was taking further advice. The Minister then made the

[25] (1947), 1 All E.R. 851.
[26] *Ibid.*, at p. 857.
[27] See sec. 1 (1) of the Act.
[28] See Schedule 1 of the Act.

order. A motion was brought to quash it on the ground that the Minister had not fairly considered the objections to the order. In support of this assertion the applicants relied upon two facts:

1. That before the New Towns Bill actually became law, the Minister, in the course of a public meeting held at Stevenage, had stated (in response to some heckling) that the Stevenage scheme *would* be carried out. 'It is no good your jeering', he told his audience, 'it is going to be done'. This statement was apparently made amidst cries of 'Dictator' and 'Gestapo' by members of the audience, whose distrust of Whitehall recalls the ancient fear of the Greeks even when they brought gifts.

2. That by confirming the order before the difficulties as to the water supply had been solved, the Minister showed that he did not have an open mind when he made the order.

The case came before Henn Collins, J.[29] The Attorney-General again argued that the Minister's function was purely executive and that the inquiry was merely an opportunity to 'blow off steam'. The learned judge rejected this argument and held that the Act did not confer arbitrary power on the Minister. In quashing the order on the ground that the Minister had displayed bias, Henn Collins, J., observed: 'One of the functions of the Court is to stand between the executive and the members of the public as far as the common law requires and legislation permits, and, if it sees that being done which is contrary to natural justice, then, within those limits it will intervene'.[30] But, alas, like so many of the evanescent things of this world, the triumph of those who heralded this decision as a valiant blow struck for the liberty of the subject was destined to be shortlived. The Court of Appeal shortly after reversed this decision.[31] Apparently the Attorney-General did not, at that stage, persist in the argument that the function of the Minister was purely executive. However, presumably on the footing that it was a quasi-judicial function, the Court of Appeal were satisfied that there was no evidence of bias and that the objectors had not fulfilled the onus that was upon them to show that the Minister had not considered the matter with a perfectly open mind. The House of

[29] *Franklin* v. *Minister of Town and Country Planning* (1947), 1 All E.R. 396.
[30] *Ibid.*, at p. 397.
[31] (1947), 1 All E.R. 612.

Lords has now [32] upheld the Court of Appeal but on more far-reaching grounds. The House took the view that the duty on the Minister under the Act was in no sense quasi-judicial, but purely administrative, and that all that was imposed upon him was the necessity of complying with the steps laid down in the Act. Any reference to judicial duty and bias was irrelevant. 'The only ground of challenge', said Lord Thankerton, 'must be either that the respondent did not in fact consider the report and the objections, of which there is here no evidence, or that his mind was so foreclosed that he gave no genuine consideration to them'.[33] The Act itself lays down that those matters must be considered, and if it could be shown that the Minister either did not consider them at all or gave them no genuine consideration, then he would have failed to take the steps provided by the Act, with which, of course, he is not free to dispense. Short of this, the courts have no power to intervene, and to introduce talk of 'bias' is to import a conception applicable only to judicial and quasi-judicial functions. The House also accepted the contention that the Minister was under no duty to offer any evidence in support of the scheme at the public inquiry.[34]

There, then, is as much of the material as I can muster for you in the time at my disposal. Of one thing I think you will probably agree we can unhesitatingly acquit our common law courts, and that is of any real trace of bias against the executive, or against social legislation generally, or of any tendency in our courts towards what Sir Ivor Jennings describes as 'the stultification of the official'.[35] I will not repeat the evidence, but you will have well in mind the court's general appreciation of the administrative process, their refusal to question the exercise of an executive discretion, and the strict limits they have imposed—self-imposed, I may say—upon the review of quasi-judicial functions. But does this imply that we must necessarily subscribe to the other view that regards the courts as the bulwark of the citizen against executive power? In this matter, I do not think we should emulate the oriental monarch who, having to adjudi-

[32] (1947), 2 All E.R. 289.
[33] *Ibid.*, at p. 296.
[34] Cf. also *Rollo* v. *Minister of Town and Country Planning* (1948), 1 All E.R. 13 (on the Crawley 'new town' plan); and *Fletcher* v. *Minister of Town and Country Planning* (1947), 2 All E.R. 496 (on the Hemel Hempstead plan). The Minister was upheld in both cases.
[35] *The Law and the Constitution* (1947 ed.), p. 234.

cate upon two poems, caused one of them to be read to him, and then at once, without more ado, awarded the prize to the other. It is pertinent rather to inquire what view the courts themselves take of their function, and how far their practice conforms with that subjective approach. Manifestly it must be conceded that the common law and those who administer it have played, and still within limits play a vital role in preserving the liberty of the subject in the broadest sense. This can hardly be denied, but I venture to add that at any rate in modern times the courts have not, in practice, regarded themselves as being, in a special sense, the guardian of the individual as against the government. Rather, in my humble view, have they acknowledged the great social changes which have occurred in the present age, and the ever-increasing importance of the administrative process. I need not remind you of the decisions and judicial dicta which I have cited in this paper and the extent to which the doctrines they enunciate derive from purely judicial interpretation,[36] but it is perhaps not unfair to say that those reported cases show that the courts regard their function as being rather to enforce the will of Parliament than to preserve individual rights as conceived by the common law. In particular, the courts have shown themselves as extremely chary of substituting their own view of policy for that of the executive, and in this respect, at least, have evinced a very nice regard for the doctrine of the separation of powers. Whether our courts have perhaps gone a little too far in this direction, and have in a sense abdicated from their constitutional position and 'laid waste their powers', I cannot take it upon myself to decide for you in this paper. All I can hope to do is to offer two possible explanations of the present role which the courts appear to ascribe to themselves in our time. First, there is, unlike the position in the United States, the fully acknowledged doctrine of the supremacy of Parliament, fortified no doubt in the mind of the court by the fact that universal suffrage prevails and that Parliament can fairly be said to represent the will of the people. From this state of affairs, the

[36] Cf. Prof. Robson on the decision in *Local Government Board* v. *Arlidge*, [1915] A.C. 120: 'Seldom have the provisions of an Act of Parliament involving issues of far-reaching constitutional importance been interpreted in a more generous and broadminded spirit than that manifested by the House of Lords . . . or with less regard to narrow minded legal pedantry'. (*Justice and Administrative Law* (1947), 2nd ed., p. 385.)

corollary seems to emerge that Parliament, rather than the courts, is the proper forum for the review of the activities of Ministers. Secondly, it must be remembered that our judges have often enjoyed an intimate acquaintance with politics and administration, either as Members of Parliament, as law officers, or in other capacities, prior to their appointment to the Bench. This applies with especial force to the House of Lords, with its dual capacity, and above all, to the Lord Chancellor, who is of course both a judge and an important member of the Cabinet. The impression is sometimes created that the judges live in a remote world, and have little knowledge of ordinary life around them. Generally speaking, however, nothing could be further from the truth.[37] Is it then surprising that judges, especially those who constitute the supreme tribunal, many of whom are not without detailed knowledge of administration, should, in weighing the public and the private interest, see further than the aggrieved citizen, who perceives only the obvious wrong to himself, while ignoring the wrong that might be wrought upon the community as a whole if the governmental process were set at naught?

In a recent address, Sir Hartley Shawcross, the Attorney-General, said this: 'Administrative law has come to stay. There are many improvements which may be made in the system. . . . But I utterly repudiate the view that, taken by and large, the present system has worked injustice or threatens our liberties'.[38] I do not take it upon myself to say whether this is or is not a more complacent view than the situation warrants.[39] What I do venture to stress, however, is that not complacency but vigilance is vital to effective public opinion, and that a very important element in that public opinion is the outlook of the legal profession as a whole. It is by constant review of the functions and functioning of the State in neither a censorious nor a too acquiescent frame of mind that the profession can bring its influence most strongly to bear in the places where it is most needed.

[37] Cf. C. K. Allen, *The Judge as Man of the World*, 46 *Law Quarterly Review*, p. 151.

[38] *The Times* newspaper, July 24, 1947. Cf. Lord Wright, *Essays and Addresses*, p. 195.

[39] See, for example, the House of Lords debate on the *Rights of the Subject Bill* introduced by Lord Reading on April 24, 1947.

7

THE PREROGATIVE OF MERCY

O. R. Marshall

The prerogative of mercy is generally thought of in terms of Home Affairs. It has, however, a much wider constitutional scope, for its territorial operation is limited only by the bounds of the British Commonwealth. It will be necessary, therefore, to consider its exercise from the point of view firstly of Home Affairs, and secondly of Colonial Affairs.

The history of this prerogative, like the history of all prerogative powers, shows that whereas in its origin it was an absolute discretionary power vested in the Sovereign, it has developed into a power, which, though still technically belonging to the King, is in reality vested in the Secretary of State for Home Affairs. This development is aptly illustrated by a comparison of two passages from two writers, one of the eighteenth, the other of the twentieth century. Thus Blackstone,[1] after speaking of the granting of a pardon as the most amiable prerogative of the Crown, goes on to say: 'Law (says an able writer) cannot be framed on principles of compassion to guilt; yet justice by the constitution of England is bound to be administered in mercy; this is promised by the King in his Coronation Oath, and it is that act of his government which is the most personal and most entirely his own. The King himself condemns no man; that rugged task he leaves to the courts of justice: the great operation of his sceptre is mercy'. His power of pardoning was said by our Saxon ancestors to be derived *a lege suae dignitatis,* and it is declared in Parliament by Statute 27, Hen. 8, c. 24, 'that no other person had power to pardon or remit any treason or felonies whatsoever; but that the King hath the whole and sole power thereof, united and knit to the Imperial Crown of this realm'. Compare this with what Pendleton Howard[2] has to say: 'It is in his capacity as adviser to the Crown in the exercise of its prerogative of mercy, or the power

[1] *Blackstone Commentaries,* Vol. 4, p. 395.
[2] Pendleton Howard, *Criminal Justice in England* (New York, 1931), p. 30.

to grant pardons to criminal offenders, that the Home Secretary is confronted with one of his most grave and difficult tasks. For he is charged particularly with deciding in all convictions for murder, whether the capital sentence should be put into effect'. This passage typifies clearly the present position: it demonstrates the appearance of power in His Majesty, its reality in the Secretary of State. This reality of power in the Home Secretary does not exist *in vacuo*; it has some statutory basis. For before the exercise of prerogative powers had become crystallised in its present form, the manner of pardoning was by deed under the Great Seal,[3] but now it is provided by statute [4] that 'where the King shall be pleased to extend mercy to any offender convicted of any felony, punishable with death or otherwise, and by warrant under the sign-manual, countersigned by one of the principal Secretaries of State shall grant to such offender either a free or conditional pardon, the discharge of such offender out of custody shall have the effect of a pardon under the Great Seal'.

The prerogative of mercy, however, differs from other prerogative powers in that the Home Secretary is not responsible to Parliament for the advice which he tenders to His Majesty. It is true that Blackstone [5] regarded it as forming one link in the vast chain of prerogative. He did not point out any of its peculiarities, as indeed he could not with accuracy have done, for in his day, as he shows in other passages, its exercise was within the personal discretion of the Sovereign. He says, 'This is indeed one of the great advantages in monarchy in general, above any other form of government, that there is a magistrate who has it in his power to extend mercy, wherever he thinks it is deserved: holding a Court of Equity in his own breast, to soften the rigour of the general law in such criminal cases as merit an exemption from punishment'.[6] Stephen, on the other hand, ignoring the question of the superiority of monarchy as a form of government, after discussing the way in which the prerogative is exercised, goes on to say '. . . and there is not even any parliamentary supervision. In almost every other instance every minister is responsible for the advice which he gives to the

[3] *Blackstone Commentaries,* Vol. 4, p. 400.
[4] 7 & 8 Geo. 4, c. 28, s. 13, Criminal Law Act, 1827.
[5] *Commentaries,* Vol. 1, pp. 268–269.
[6] *Commentaries,* Vol. 4, p. 395.

Sovereign, but this case forms in practice an exception'.[7] There are two reasons which prohibit the discussion in Parliament of the Home Secretary's exercise of the prerogative. These vary with the progress of the case through the courts. Thus if the case is still being tried, or if after the verdict of a jury the time for lodging an appeal has not yet elapsed, the Speaker will not permit the House to discuss the case. Parliamentary discussion of matters pending judicial decision is not permitted, first, because it would be an unjustifiable usurpation of the functions of a court of law and, secondly, because its ultimate result might be to prejudice the outcome of a case which is *sub judice*.[8] But if the case has been finally heard by an appellate court, or by the court of first instance, in cases where no appeal is possible or where the time for lodging an appeal has elapsed, then parliamentary discussion cannot be prohibited on the ground that the case is still *sub judice*. Nevertheless discussion is not permitted. 'A question with regard to the exercise of the prerogative of mercy in connection with persons sentenced to capital punishment is not in order'.[9] The reason for this is not difficult to find. If Parliament were permitted to question the discretion of the Minister, it would in effect be constituting itself into a Court of Appeal from the highest judicial tribunals in the land. This would be an intolerable position, and would destroy that certainty which is one of the main characteristics of the English Criminal Law. The utmost that Parliament can do is to move a reduction in the Minister's salary which if carried would result in his retirement from office. 'In the event of Parliament finding it necessary to express disapproval of the grant or denial of a pardon in a particular case their censure would as a rule be deemed to fall upon the head of the Home Secretary alone, and to involve no other consequences than that of his personal retirement from office'.[10]

The prerogative of mercy is the final hope of a prisoner who has been condemned to capital punishment. It is a last resort which may relieve those who lie under a settled, hopeless, expectation of death. It follows that it usually comes into operation

[7] Stephen, *General View of the Criminal Law of England*, p. 224.
[8] Erskine May, *Parliamentary Practice* (1946 ed.), pp. 337 and 430, and authorities there cited.
[9] Erskine May, *op. cit.*, p. 335, and authorities there cited.
[10] H. D. Traill, *Central Government*, revised ed., (London, 1908), p. 65.

after the case has been judicially determined.[11] This does not mean that the case must have been heard by an appellate court. It must be remembered that the Criminal Appeal Act, 1907 [12] provides for an appeal by a convicted person against conviction in certain cases only:

(1) as of right on any ground of appeal which involves a question of law alone;

(2) with the leave of the Court of Criminal Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal;

(3) with leave of the Court of Criminal Appeal against the sentence passed on his conviction unless the sentence is one fixed by law.

Now there are innumerable cases in which there is no question of law or fact on which the prisoner can possibly hope to succeed on appeal. This is due in the main to two reasons, first, the criminal law consists of rules which are precise and certain, so that the possibility of a misdirection of the jury on a question of law is remote, and secondly, since in the English criminal law the facts are found by a jury, and jury trial in matters affecting life is an inviolable constitutional principle, the Court of Criminal Appeal will generally be unwilling to upset the findings of a jury. It is true that the wrongful reception or exclusion of evidence is a question of fact, on which an appeal may be based. Nevertheless, so strong is the confidence in jury trial in England that the Court of Criminal Appeal will not quash a conviction unless it is reasonably probable that the jury would not have returned their verdict but for the wrongful reception or exclusion of the evidence in question: and the burden of establishing this lies upon the appellant.[13]

In these circumstances it would be expected that the number of appeals in criminal cases would be small. On the contrary, however, they are exceptionally high. This seems to be the result of two divergent trends of thought:

[11] A pardon may, however, be granted *before* trial.
[12] 7 Edw. 7, c. 23, s. 3.
[13] Archbold, *Criminal Law* (1944 ed.), p. 307, and authorities there cited.

1. An erroneous belief that the exploration of all legal channels by way of appeal is a condition precedent to the exercise of the prerogative by the Home Secretary. That this is not so is obvious when the number of cases in which insanity has been pleaded as a defence is considered. In many of these appeal is never made; yet the Home Secretary often orders the condemned person to be detained as a lunatic during His Majesty's pleasure. Indeed there is an automatic review by the Home Secretary of every case involving capital punishment before the sentence is carried out.

2. A justifiable reliance on s. 19 of the Criminal Appeal Act, 1907. This provides that in considering a petition for mercy in cases other than those involving the death penalty, the Home Secretary may refer the whole case to the Court of Criminal Appeal and the case shall then be heard and determined by the Court of Criminal Appeal as in the case of an appeal by a person convicted. It follows that a determination of the matter by the Court of Criminal Appeal *before* the petition to the Home Secretary will forestall the Home Secretary from referring the matter to the Court a second time, and probably regarding their decision as final.

In spite of this the number of cases in which convictions are quashed by the Court of Criminal Appeal is small so that in the majority of cases it is to the Home Secretary that the condemned person must look for relief.

The prisoner has a specified time (ten days) within which to give notice of appeal or notice of his application for leave to appeal. It is provided by Criminal Appeal Act, 1907, s. 7 (2) (a) that sentence of death shall not be carried out until after the expiration of the time within which notice of appeal or of an application for leave to appeal may be given under the section. Section 7 (2) (b) provides that if notice is given, the sentence shall not be carried out until the appeal has been heard, or the application for leave to appeal has been refused. This is adequate protection for the prisoner who need not fear that he will be executed before the Court of Criminal Appeal has had the opportunity of hearing his application, or the Home Secretary has reviewed the case. Contrast this with the position in the time

of Chief Justice Hale: 'A trial was brought before him at Lincoln concerning the murder of one of the townsmen who had been of the King's party, and was killed by a soldier of the garrison there; he was in the fields with a fowling-piece on his shoulder which the soldier seeing, he came to him and said "It was contrary to an order the Protector had made that none who had been of the King's party should carry arms" and so would have forced it from him; but as the other did not regard the order, so being stronger than the soldier he threw him down, and having beat him he left him; the soldier went into the town, and told one of his fellow-soldiers how he had been used, and got him to go with him and lie in wait for the man that he might be revenged on him: they both watched his coming to town, and one of them went to him to demand his gun, which he refusing, the soldier struck him and as they were struggling the other came behind and ran his sword into his body, of which he presently died. It was in the time of the Assizes, so they were both tried: against the one there was no evidence of forethought felony, so he was only found guilty of manslaughter, and burned in the hand; but the other was found guilty of murder, and though Colonel Whaley, that commanded the garrison, came into court and urged that the man was killed only for disobeying the Protector's orders, and that the soldier was but doing his duty, yet the judge regarded both his reasonings and his threatenings very little, and therefore he not only gave sentence against him, but ordered the execution to be so suddenly done that it might not be possible to get a reprieve which he believed would have been obtained if there had been time enough granted for it'.[14] Campbell rightly observes that 'this haste was a very unjustifiable interference with the prerogative of mercy lodged according to the constitution which Hale had sworn to respect in the Lord Protector'.[15]

Assume, now, that the prisoner has been condemned to death, and that he decides not to appeal, or that his appeal has gone against him. Assume, too, that the circumstances of the crime are exceptional, and that though the prisoner has no defence in law, yet there is a considerable body of public opinion which feels that he should not be called upon to pay the supreme

[14] Burnet, *Our Times*, pp. 13–14.
[15] Campbell, *Lives of the Chief Justices*, Vol. 2, p. 177.

penalty. The best course for the prisoner to adopt in these circumstances is to get his legal advisers to draft a petition to the Home Secretary asking for mercy, and setting out the facts which in his opinion justify it. He should get this petition subscribed by as many people as are willing, and should then send it to the Home Secretary. After the presentation of the petition the Home Secretary will deal with it as he thinks proper. Invariably he consults the judge who tried the case,[16] and the members of the Court of Criminal Appeal, if the case went on appeal. He reviews the facts of the case, and finally when he is satisfied with his inquiries, he either declines to advise His Majesty to interfere, or advises him to grant a reprieve, commutation of sentence or a free or conditional pardon. It may be, however, that he is unable to make up his mind one way or another until some alleged new piece of evidence is examined. He may then as in *Rowland's* case [17] order an independent judicial inquiry to be held to examine the new piece of evidence.

Rowland's case is perhaps the most dramatic instance of the fluctuations of public opinion since the well-known case of *Adolf Beck*.[18] Rowland was convicted of murder and sentenced to death. His defence was an alibi. He appealed. He obtained leave to call, on the hearing of the appeal, two witnesses whose evidence was not available at the trial. Leave to call a third witness who had been interviewed by his solicitor before the trial was refused. The court also refused to call a fourth witness, named Ware, who while in prison made an alleged confession of the murder after Rowland had been convicted. Mr. Justice Humphreys, in delivering the judgment of the court, pointed out that it was no light matter to reverse the finding of a jury who had convicted a person of murder after a trial extending over five days in which twenty-eight witnesses were called. He went on, ' It was obvious that the mere statement of a person such as Ware that the convicted man is innocent because he himself is guilty, even if made on oath, would not justify quashing the conviction of that other person, but would only be the beginning of an inquiry which would involve in the light of the new evidence the recalling of many witnesses and probably the

[16] Stephen, *General View of the Criminal Law of England*, p. 224. Pendleton Howard, *Criminal Justice in England*, pp. 30–31.
[17] *R.* v. *Rowland* (1947), 32 Cr. App. R. 29.
[18] For a full account of Beck's misfortunes, see O'Donnell, *Trials of Mr. Justice Avory*, pp. 45–56.

calling of several fresh ones. Such an inquiry would be of a totally different character from the simple issue involved in the calling of a fresh witness to speak to some fact connected with the defence put forward at the trial'. Another even more fundamental reason for refusing to call Ware was that had he persisted in his confession the court would have been bound to form some opinion as to his guilt or innocence. In doing so they would be (a) usurping the functions of a jury and (b) prejudicing the subsequent trial of Ware. The learned judge then expressed the limits upon the powers of the Court of Criminal Appeal. 'We have no power even to direct a new trial by a jury, much less have we the right to conduct one ourselves'. He then concluded with a passage the sentiments of which are found throughout the Criminal Appeal Reports.[19] 'Finally we are not unmindful of the fact that there exists an authority in the person of the Home Secretary who has far wider powers than those possessed by this court, who is not bound as we are by rules of evidence, and who has all the necessary machinery for conducting such an inquiry as is here asked for'. The Home Secretary acted upon the recommendation of the Court of Criminal Appeal. He set up a judicial inquiry under Mr. Jolly, K.C. who examined Ware in prison. He reported that Ware had withdrawn his confession under examination, and that the details of the confession were consistent with Ware having read them in the newspapers.[20] Rowland was accordingly hanged, and public opinion, which was prepared to believe that an innocent man was going to his death, was eventually satisfied.

The criticisms which have been levelled against the prerogative of mercy must now be examined. These may be summarised as follows:—

1. The exercise of the prerogative of mercy, like the permission of appeals on questions of fact, is inconsistent with the constitutionality of juries.
2. The manner of its exercise is unscientific.
3. The burden of granting or refusing a pardon is too heavy a responsibility to be reposed in a single individual.
4. The irresponsibility of the Home Secretary for its exercise may be open to abuse.

Each must be considered in turn.

[19] See *e.g. R.* v. *True* (1922), 16 Cr. App. R. 164.
[20] Cmd. 7049 (1947).

I. INTERFERENCE WITH THE CONSTITUTIONALITY OF JURIES

The argument is that the principle of trial by jury for serious offences is a constitutional right in England; that the exercise of the prerogative by the Home Secretary is an interference with this right, and that consequently its exercise is itself unconstitutional. This is ingenious but unsound. For though it is possible to deny that jury trial is a principle of our constitution, it is impossible to maintain the thesis that the exercise of prerogative powers can be unconstitutional, provided that they are exercised in the manner and within the limits required by statute or common law. The prerogative of mercy appears to be at least as old as the system of jury trial, and their existence side by side for many centuries is certainly not proof of the illegality of the one and the constitutionality of the other. There is, however, no inconsistency in substance between jury trial and the prerogative of mercy. The jury find the prisoner guilty of a crime: the judge passes sentence: the Home Secretary thinks that the circumstances of the case are exceptional, and that though the prisoner is guilty in law, the full punishment required by law should not be meted out to him. The Home Secretary does not relieve the prisoner of his guilt; he merely mitigates its consequences.[21]

II. THE MANNER OF ITS EXERCISE IS UNSCIENTIFIC

This is the particular criticism of Stephen. 'The mode of administration is wrong, because under it a function which is really judicial is discharged by an irregular, irresponsible and secret tribunal consisting of a single statesman who has no special acquaintance with law and no judicial experience, who can neither examine witnesses nor administer oaths and who consummates an irregular procedure by pardoning a man for his guilt on the ground of his innocence'.[22] With all due respect to Stephen, it is submitted that his criticism is unjustified. In the first place it is possible to regard the functions of the Home Secretary as administrative. They seem to be no more judicial than are the functions of a judge in passing sentence. Secondly, it is doubtful whether the 'epithet' irregular is justly applied

[21] Indeed this is the fundamental difference between the prerogative of mercy and the famous dispensing power which was declared illegal by the Bill of Rights, 1689.

[22] Stephen, *General View of the Criminal Law of England*, p. 230.

to a procedure which is probably administrative. Thirdly, it is wrong to say that the effect of the exercise of the prerogative is 'to pardon guilt on the ground of innocence'. The Home Secretary does not admit the innocence of the convicted man; he merely says that in all the circumstances of the case the convicted person ought not to suffer the full consequences of his guilt.

III. THE BURDEN IS TOO HEAVY FOR A SINGLE INDIVIDUAL

There can be no doubt that the burden of exercising the prerogative is a very grave and serious one. This burden is intensified when, as at present, controversies rage around the dual topics of insanity and capital punishment. The Home Secretary may be and often is ahead of the time in which he lives in matters relating to the administration of criminal justice. Nevertheless, he must exercise the prerogative which is vested in him in such a way as not to conflict with public opinion. Thus, though he may be a protagonist of the abolition of capital punishment, he cannot *legally* abolish the death penalty by the expedient of commuting all death sentences. But he must select the recipients of his favour as if he were a keen supporter of capital punishment. This inner conflict is indeed a burdensome one.

IV. THE IRRESPONSIBILITY OF ITS EXERCISE MAY BE OPEN TO ABUSE

This is a political argument to this effect. The Home Secretary is not responsible to Parliament for the exercise of the prerogative. It might well be that in time of conflict he would exercise the prerogative in favour of his own supporters to the detriment of his opponents. This is speculation which is provoked by memories of Stuart indiscretions. It would serve no useful purpose to consider further what would happen should such times recur. Suffice it to say that the experience of its exercise since the Restoration does not warrant any rash assertions of future abuse.

It is easy to criticise the exercise of the prerogative of mercy: it is difficult to find a satisfactory remedy. The following are the remedial suggestions which have been put forward:—

I. CONSTITUTE THE HOME SECRETARY A PARTY TO THE APPEAL

Stephen put forward this suggestion in the following words [23]: 'The true remedy for this state of things would be to constitute a court of law, charged with the duty of doing openly and judicially what the Home Secretary does at present in secret. It might be enacted that if it appeared to the Home Secretary that after the conviction of any person for a crime, new evidence or new reasons to doubt the truth or accuracy of the evidence actually given had been discovered; or if the judge who tried the cause was dissatisfied with the verdict, the Home Secretary might call together a court, to be composed of the judge who tried the case, one other judge and the Home Secretary himself, who should call before them any witnesses they pleased and examine both them and the prisoner [24] (if they thought fit) in open court; and also if they thought fit hear arguments by counsel, and finally deliver judgment either confirming, quashing, or varying the verdict of the jury as they thought proper. In order to protect the constitutional authority of the jury, it would be necessary to provide expressly as a condition precedent to the summoning of the court that the Secretary of State should certify that new evidence had been discovered, or that the judge should certify that he was dissatisfied with the verdict. In this way the prerogative of mercy would be confined to its proper function, that of mitigating the severity of punishments in particular cases. The absurdity of pardoning guilt on the ground of innocence would be done away with, and the public would know in a definite authoritative form on what grounds the verdict of a jury was overruled'. This is a very ingenious proposal which, doubtless, has its supporters among those who see in the irresponsibility of the Home Secretary a threat to the administration of justice in equal measure for every person. I, myself, do not think that this is a serious threat, and I fail to see how the certificate of the Home Secretary that new evidence had been discovered could preserve the constitutional authority of the jury, since it is in determining the weight which is to be attached to that evidence that the constitutional authority of the jury lies.

[23] *General View of the Criminal Law of England*, pp. 230–231.

[24] When Stephen wrote, there was no Court of Criminal Appeal, nor could prisoners give evidence in their own defence.

II. IN CASES OF DOUBT GIVE THE HOME SECRETARY THE POWER TO ORDER A NEW TRIAL ON HIS OWN UNDIVIDED RESPONSIBILITY

This suggestion was put forward by the Criminal Code Commission of 1878–1879.[25] It is interesting to note that this procedure could have been applied to circumstances like those in *Rowland's* case,[26] but that the Home Secretary, while not having the power to order a new trial of Rowland with the taking of Ware's evidence as an essential part of it, solved the difficulty by setting up an independent judicial inquiry into Ware's alleged confession. The Commission considered that the most difficult question arose in cases of newly-discovered evidence which tended to show the prisoner innocent. It rejected the solution of setting up a Court of Appeal to hear and decide upon that evidence for the following reasons. The evidence must either be heard orally, and its validity decided by the court, which would be an unjustifiable encroachment on the functions of the jury, or it must be taken on affidavit, which would be worthless in criminal cases. It, therefore, came to the conclusion that 'Cases in which, under some peculiar state of facts, a miscarriage of justice takes place, may sometimes though rarely occur; but when they occur it is under circumstances for which fixed rules of procedure cannot provide'. It then went on to make the recommendation summarised above. 'Experience has shown that the Secretary of State is a better judge of the existence of such circumstances than a Court of Justice can be. He has every facility for inquiring into the special circumstances; he can and does, if necessary, avail himself of the assistance of the judge who tried the case, and of the law officers. The position which he occupies is a guarantee of his own fitness to form an opinion. He is fettered by no rule, and his decision does not form a precedent for subsequent cases. We do not see how a better means could be provided for inquiring into the circumstances of the exceptional cases in question. The powers of the Secretary of State, however, as to disposing of the cases which come before him are not as satisfactory as his power of inquiring into their circumstances. He can advise His Majesty to remit or commute a sentence; but to say nothing of the inconsistency of pardoning

[25] See the quotation in Stephen, *History of the Criminal Law*, Vol. 1, pp. 313–318.
[26] (1947), 32 Cr. App. R. 29.

a man for an offence on the ground that he did not commit it, such a course may be unsatisfactory. The result of the inquiries of the Secretary of State may be to show, not that the convict is clearly innocent but that the propriety of the conviction is doubtful; that matters were left out of account which ought to have been considered; or that too little importance was attached to a view of the case the bearing of which was not sufficiently apprehended at the trial: in short the inquiry may show that the case is one on which the opinion of a second jury ought to be taken. If this is the view of the Secretary of State he ought, we think, to have the right of directing a new trial on his own undivided responsibility. Such a power we accordingly propose to give him by s. 545'. This seems to be the most efficacious proposal. In general there is no ground for criticising the way in which the prerogative of mercy is exercised: but in cases where the Home Secretary, after having reviewed the case, remains in doubt, he ought to be given statutory power to direct a new trial before a second jury: at this trial the matters causing doubt could be specifically dealt with and decided.

Let me turn now to the prerogative of mercy in Colonial Affairs. Its exercise is delegated to Colonial Governors by Letters Patent. A typical example of the terms of delegation is as follows: 'Where any crime or offence has been committed within the Colony, or for which the offender may be tried therein, the Governor may, as he shall see occasion, in Our name and on Our behalf grant a pardon to any accomplice in such crime or offence, who shall give such information and evidence as shall lead to the conviction of the principal offender or of any one of such offenders if more than one; and further may grant to any offender convicted of any crime or offence in any court or before any judge, justice or magistrate within the colony, a pardon either free or subject to lawful conditions, or any remission of the sentence passed on such offender, or any respite on the execution of such sentence, for such period as the Governor thinks fit, and may remit any fines, penalties, or forfeitures which may become due and payable to us'.[27] The

[27] Letters Patent dated February 9th, 1929, for the Colony of Fiji. See also *Times* newspaper, July 2, 1947. British reply to United Nations' Committee resolution on the three Jews.

See Mr. Speaker's ruling from the chair concerning the exercise of the Prerogative of Mercy in the Gold Coast. He refers to the Letters Patent of March 7, 1946, Clause 12, and to Article 23 of the Instructions under the Sign Manual. *Times* newspaper, March 11, 1947.

Letters Patent combined with the Instructions under the Sign Manual indicate specifically the manner in which the power is to be exercised.

However, in delegating the prerogative to a Colonial Governor, His Majesty does not entirely divest himself of the prerogative. A residue of power remains in the Crown which in Colonial Affairs would be exercised on the advice of the Colonial Secretary, in just the same way as in Home Affairs it is exercised on the advice of the Home Secretary.[28] This residuary prerogative vested in the Colonial Secretary is important, because although it is unlikely that the Colonial Secretary would advise His Majesty to interfere with the discretion of the Governor, who as the man on the spot is normally best qualified to decide, yet in a clear case of miscarriage of justice in which the Governor had refused to exercise his prerogative, public opinion in this country might force the Colonial Secretary to advise His Majesty to act over the head of the Governor. This might result in the resignation of the Governor; but the alternative in a strong enough case would be the resignation of the Colonial Secretary.

Like the exercise of the prerogative of mercy in Home Affairs[29] this residuary prerogative of the Colonial Secretary cannot be questioned in Parliament.

The reasons for the rule are the same in both cases. There is, however, a gloss to be added. Discussion of the exercise of the prerogative, whether in Home or Colonial Affairs, is not permitted so long as the sentence remains to be carried out. But it appears that after the sentence has been executed, it is permissible to challenge the Home or Colonial Secretary, as the case may be. This appears from a ruling of the Speaker.[30] 'That was so in the case of Smith and Harcourt, which he had quoted. The man had been hanged some five months before. Hon. members could not raise the matter with the Home Secretary one way or the other until the sentence had been carried out. The general question, provided it did not involve legislation, was naturally a subject of debate in the ordinary way without referring to the administration of a particular case

[28] *Times* newspaper, March 11, 1947; *Hansard,* March 10, 1947, cols. 958–962.
[29] *Ante,* p. 105 *et seq.*
[30] *Times* newspaper, March 11, 1947.

under judgment at the time'. The partial relaxation of the general rule after the execution of the sentences is devoid of practical results if the main purpose of seeking the power of discussion is to prevent their execution.

But unlike the procedure in England there is no specified time within which notice of application for leave to appeal to the Privy Council must be given in Colonial cases. Nor is there any legal rule which prohibits the carrying out of sentence of death merely on the ground that an application for leave to appeal to the Privy Council has been lodged.[31] This is the substance of a statement by the Colonial Secretary, Mr. Creech Jones, on the subject. He said[32]: '. . . the fact that an application for leave to appeal is being made is plainly one of the facts which a Governor would take into consideration in deciding whether or not to postpone the carrying out of the sentence and the normal practice which governors have followed in the event of such an application being brought to their notice has been to postpone sentence pending the hearing of the application. This practice will no doubt continue, but the Government's view is that in the future if a Governor comes to the conclusion that any application for leave to appeal is without real substance, he should not allow the mere fact that an application is pending to affect his judgment in the carrying out of the death sentence. It is, however, of the utmost importance that when a Governor decides to postpone sentence pending the hearing of an application, the proceedings should be so conducted as to enable the application to be disposed of in the quickest possible time. The Judicial Committee of the Privy Council already have a rule requiring a petition to be lodged with the least possible delay, but the Government propose to consider whether more definite provisions[33] should not be made to secure this object. I am in communication with the Lord Chancellor and the Law Officers on the whole matter'. The statement that a Colonial Governor has power to carry out sentences of death

[31] This does not mean that sentence may be executed before the Governor has reviewed the case. In this respect it differs from the case cited from Burnet, note 14.

[32] *Times* newspaper, April 5, 1947.

[33] See Letter *Times* newspaper, March 31, 1947, from Lord Simon, which concludes with the words 'Ought there not to be a time limit within which an appeal to the Privy Council is to be entered, so that the proper course of justice is not delayed?'.

in spite of the fact that an application for leave to appeal to the Privy Council, of which he has notice, has been lodged is indeed a surprising one, especially when it is compared with the position which exists in England.[34] But the statement must be read in conjunction with the circumstances which gave rise to it, namely the recent Gold Coast case.

This case was for some little time a storm of controversy. Its long and chequered history drew from Lord Simon [35] the remark that it was due in large part to the 'misspent ingenuity' of the legal advisers of the accused, and from Lord Thankerton [36] the following rebuke, 'Their lordships view with grave concern and disapproval the multiplication of applications to the Board. Their lordships find it difficult to avoid the conclusion that that course was either adopted deliberately, which would constitute an abuse of the due administration of justice, or arose from an inexcusable ignorance or disregard of the law, procedural or otherwise, involved in applications to the Board'. Let me then give a brief account of the case:—

The eight accused were found guilty on December 1, 1944 of the murder of one Akyea Mensah, a minor chief, who disappeared at the time of the funeral ceremonies on the death of Sir Ofori Atta. The conviction was affirmed by the West African Court of Appeal on February 15, 1945. Leave to appeal to the Privy Council was refused on November 5, 1945. After the Privy Council's refusal, the legal advisers of the accused discovered:

1. That the trial had taken place after committal on a coroner's inquisition finding a prima facie case of guilt, on the Information of the Attorney-General of the Gold Coast.

2. There had been no preliminary inquiry by and in a magistrate's court, and no committal for trial by such court as was required by the Criminal Procedure Code of the Gold Coast.[37]

They contended that the holding of a preliminary inquiry by magistrates and committal for trial by them was a condition precedent to the filing of an Information by the Attorney-

[34] *Ante*, p. 108.
[35] See footnote 33.
[36] When dismissing the final application for leave to appeal. Reported in the *Times* newspaper, July 17, 1947.
[37] Part 5, ss. 167 to 197.

General. Alternatively, the coroner's inquisition should have found a case not merely of prima facie, but of actual guilt, on which the Information could have been laid. Since neither of these two methods of procedure had been followed, they maintained that the whole trial was null and void, and that if it had taken place in England the Court of Criminal Appeal would have so held.[38] Throughout, the Crown maintained that the proceedings were perfectly regular in all respects, and that it was proper after the coroner's committal for the Attorney-General to prepare and present an Information, and that there had been no possible prejudice to the accused.[39] The Privy Council, it will be remembered, had refused the first application for leave to appeal on November 5, 1945, on the ground that there had been no suggestion of any denial of natural justice, sufficient to justify its interference.[40] Nevertheless the legal advisers of the accused decided to take every step to establish the nullity of the trial. Now follows an amazing chapter of industry, ingenuity and delay. It will be convenient to set this out in summary form :—

1. On November 22, 1945 application was made for an order of certiorari to a judge of the Supreme Court of the Gold Coast to have the conviction quashed. On November 30, 1945 the application was refused on the ground that the court had no jurisdiction to quash a conviction made by itself. On January 21, 1946 leave to appeal to the Privy Council was refused on the ground that the accused were not then complaining of an unfair hearing at the trial, but that the whole trial was illegal in its inception. One would have thought that this would have ended the matter, but

2. In January 1946 they applied to the Attorney-General of the Gold Coast for his fiat for the issue of a writ of error. Now a writ of error is an ancient remedial writ whereby errors appearing on the record of the case could be brought before the King's Bench for consideration. The record is simply the formal history of the proceedings made

[38] They relied on *R.* v. *Crane,* [1921] 2 A.C. 299. See letter to the *Times* newspaper, April 1, 1947, from the prisoners' solicitor, Mr. A. L. Bryden. They also relied on *R.* v. *Gee, Bibby, Dunscombe,* [1936] 2 K.B. 442.

[39] *Times* newspaper, July 17, 1947.

[40] The Privy Council is not a Court of Appeal *as of right* in criminal cases. The conditions which have to be satisfied before it will grant leave to appeal are strict. See *In re Dillett* (1887), 12 App. Cas. 459.

up by the officer of the court.[41] On April 29, 1946 the Attorney-General refused his fiat.

3. On May 7, 1946 they applied to the Supreme Court of the Gold Coast for a mandamus to compel the Attorney-General to give his fiat for the issue of the writ of error. They contended first that the court had jurisdiction in matters of error. They admitted that the writ of error was abolished by the Criminal Appeal Act, 1907 for this country, but maintained that the Act did not extend to the Gold Coast. Their second argument was that it was the duty of the Attorney-General to give his fiat to the writ of error, and that he had no discretion in the matter. They relied on Resolutions of the Commons[42] and of the Lords[43] to the effect that the writ was to be issued as of right, not as a matter of grace, and they concluded that as a result of these resolutions the Attorney-General's fiat could be compelled by an order of mandamus. It would then be for the court to decide whether or not there had in fact been an error. This line of argument, however, was open to the objection that neither the Lords nor the Commons can alter the law by resolutions.[44] The real question was, therefore, whether the writ issued as of right by virtue of the general law. In this connection they relied on Stephen's *History of The Criminal Law,* Vol. 1, p. 309. Stephen, however, does not say that the writ issues as of right in cases of felony: what he does say is that it is never refused when any point which can be regarded as arguable arises. This is not the same thing.[45]

In spite of their contentions, which it is submitted were erroneous, the Supreme Court refused the application on the ground that there was no jurisdication in error in the Gold Coast.[46]

41 Stephen, *General View of the Criminal Law of England,* p. 224.
42 November 19, 1689.
43 February 27, 1704.
44 *Stockdale* v. *Hansard* (1839), 9 A. & E. 1; *Bowles* v. *Bank of England,* [1913] 1 Ch. 57.
45 See also Stephen, *Digest of Criminal Procedure,* p. 195, 'In cases of treason and felony the Court will not interfere with the discretion of the Attorney-General as to issuing a writ of error'.
46 It is submitted that they would also have failed, had there been such jurisdiction, to *compel* the Attorney-General to grant his fiat. See *Ex p. Costello* (1868), Ir.R. 2 C. L. 380. 'A.-G. for Ireland refused to consider a writ of error without a fee of 15 guineas, and a mandamus

On July 15, 1946 leave to appeal against the refusal of the mandamus was disallowed by the Privy Council.

4. On July 16, 1946 the accused brought an action for damages against the Attorney-General for having denied them their constitutional right to a writ of error, presumably on the analogy of *Ashby* v. *White*.[47]

On August 7, 1946 these proceedings were stayed by the Supreme Court of the Gold Coast. On September 14, 1946 the West African Court of Appeal refused leave to appeal from the order staying these proceedings.

On December 9, 1946 leave to appeal to the Privy Council from the decision of the West African Court of Appeal was refused.

This civil action seemed to be nothing less than an attempt to have the question of error reopened by a different and indirect process.

5. From this date on preparations which had been held up by this fanciful series of applications for leave to appeal were continued for the execution of the sentences. But the end was not yet. Public opinion in this country was horrified at what looked like a ' cat-and-mouse ' attitude to the condemned men, who had several times secured a respite, as some fresh procedural step was taken to tie the hands of the Governor. Attempts were made to discuss the matter in Parliament with no success.[48] While this attempt was being made, a further respite was granted, but with its failure the day for the execution was fixed. But the legal advisers of the accused had one more card to play. On March 24, 1947 they applied to Mr. Justice McCarthy of the Gold Coast, Eastern Judicial Division, Accra, for a writ of habeas corpus directed to the Director of Prisons, Accra, in whose custody the accused were being detained. The application was refused at 1 p.m. (Gold Coast time). Counsel for the condemned men stated in Court that they would appeal to the Privy Council, but no notice was given to the Governor, nor was application made to him for

was applied for. The Court thought the fee was too large to have existed in the time of Richard I, and so to be chargeable by prescription. The A.-G. surrendered '.

[47] (1704), 2 Lord Raym. 938.

[48] See *ante*, pp. 116–118.

postponement of the executions until after three of the accused had been executed. Written notice of appeal was received by the Director of Prisons at 3.40 p.m. By that time three of the five men then living (three men had died in prison) had been executed.[49] The Governor thereupon felt that these remaining two men had been exposed to sufficient mental agony during the time when they knew that the executions were taking place to justify a commutation of sentence. With regard to the situation before the executions actually commenced he said, ' It is my conviction that on each occasion the condemned men were well aware of the intention of the defence to take . . . last-moment steps to avert the execution. For this reason they did not believe they were about to be executed and therefore suffered none of the mental torture alleged '.[50] The anti-climax of this remarkable case came when on July 16, 1947 the Privy Council refused leave to appeal from the decision of Mr. Justice McCarthy refusing a writ of habeas corpus in respect of the two survivors.[51] Thus ended one of the most remarkable cases of our times.

As a national newspaper put it, ' Murder in 1943, sentence in 1944, execution in 1947, is a sequence which must not be permitted to recur '.[52] What then must be done about it. Two proposals have been put forward :—

(1) *Make use of the existing rule that the fact that an application for leave to appeal to the Privy Council has been lodged constitutes no legal barrier against the carrying out of the death sentence.*

This indeed is the basis of a statement of the Colonial Secretary.[53] Its purpose is to prevent delay between sentence and execution. It would give to the Governor the power to decide whether the application for leave to appeal was without real substance, and if he came to the conclusion that it was, he would be permitted to carry out the sentence despite the pending application. Apart from the obvious objection that the exercise of such wide power might

[49] *Times* newspaper, March 26, 1947.
[50] *Times* newspaper, March 31, 1947.
[51] *Times* newspaper, July 17, 1947.
[52] *Times* newspaper, March 31, 1947.
[53] *Times* newspaper, April 5, 1947.

be open to abuse, it is submitted that there is no good reason why the same system which applies in this country to applications for leave to appeal should not be made applicable to the colonies.

(2) This indeed is the substance of the second proposal which was made by Lord Simon in a letter to *The Times* newspaper.[54] His proposal is divisible into two parts.

(a) *The imposition of a time limit within which an appeal to the Privy Council is to be entered, so that the proper course of justice is not unduly delayed.*

This would be the application to the colonies of the rule which applies in English appeals. The time limit would obviously have to be longer, because of the delays of communications, but the fact that a precise time limit was fixed would have the dual effect of expediting applications for leave to appeal, and at the same time of not putting the Governor in the embarrassing position to which he would be exposed, were the Government proposal the only remedy.

(b) *The creation of a rule that a single petition for leave to appeal should contain all the grounds relied on, so that if it is dismissed by the Privy Council the law will promptly take its course.*

The object of this rule would be to prevent a repetition of the events in the recent case. It will be remembered that the accused were convicted on December 1, 1944; their appeal was dismissed by the West African Court of Appeal on February 15, 1945; leave to appeal was refused by the Privy Council on November 5, 1945. It will also be remembered that at none of these trials was any argument based on the illegality of the pre-trial proceedings. Yet within seventeen days, that is on November 22, 1945, the legal advisers of the accused were applying to the Supreme Court of the Gold Coast for an order of certiorari to quash the convictions on the very grounds of illegality in the pre-trial proceedings. Their excuse for not having raised the matter before was that it had only just come to light. While it would be unprofessional for me to question the bona fides of the legal advisers of the accused,[55] it is

[54] March 31, 1947.

[55] See, however, Lord Thankerton's rebuke. *Times* newspaper, July 17, 1947, cited *ante* footnote 36.

certainly undesirable that a matter which had remained undiscovered for some eleven months (*i.e.* from the date of the convictions on December 1, 1944 to the refusal of the Privy Council to grant leave to appeal on November 5, 1945) should within less than three weeks (from November 5, 1945 to November 22, 1945) be made the basis of an attempt to upset all that had gone before, especially after the Privy Council had said that there was nothing in the trial which could possibly have prejudiced the accused. If the conduct of proceedings in this way were allowed to continue, there would never be any finality in judicial decisions. It is for these reasons that it is to be hoped that Lord Simon's suggestions will be speedily put into effect.

It will be convenient to end with a reassurance that no miscarriage of justice took place in the recent case. It will be remembered that part of the case for the accused at the trial was that the prosecution was a 'put-up job', and was the result of a conspiracy by political rivals. In support of this, certain witnesses swore that they had seen Akyea Mensah, the murdered man, alive after the date of the alleged murder. This evidence was disbelieved, and the accused convicted. Subsequently four people, one of whom was a brother of four of the accused in the murder trial, were convicted by the Supreme Court of the Gold Coast on December 29, 1944 of conspiracy to abet perjury by procuring certain persons to swear falsely that they had seen alive one Akyea Mensah after the date of his murder for which the eight people had been convicted. Their appeal to the West African Court of Appeal was dismissed on February 5, 1945. Leave to appeal to the Privy Council was refused on June 27, 1947.[56] Lord Oaksey, giving the judgment of the Board, said that in their opinion no injustice had been done; there was ample evidence to support the finding that the four appellants were guilty of the conspiracy charged.

[56] *Times* newspaper, June 27, 1947.

8

INDUSTRIAL RELATIONS IN CRIME AND TORT

H. G. Hanbury

This subject is one in which it is pre-eminently important that we do not lose sight of the fact that crime and tort are in their origins much akin. The action of trespass, that 'fertile mother of actions', as Maitland has aptly called it, itself springs from the criminal law, and from it radiates the action of case, which in its turn gives birth to assumpsit and trover. So, while much of tort and most of contract have travelled far from their source, there are times when we need a reminder that the criminal law is that source. In many problems in tort, and quite a number in contract, it is a useful mental exercise to reflect whether any light can be shed upon them from the angle of criminal law. Especially is this so in libel and in conspiracy. On one of these I must incidentally touch in this paper, on the other I must dilate at greater length. But right at the outset I will quote the words of Holdsworth, 'The essential features of conspiracy considered as a crime differ more markedly from conspiracy considered as a tort than is the case with the crime and the tort of libel'.[1]

Now first it is vital to remember two things:—

1. There are crimes which may be called political crimes, and which may range in gravity from treason at the top to sedition at the foot. There are other crimes, such as strikes in certain public utility undertakings, or payment by an employer of a smaller wage-rate than that fixed by a Wages Council, which may be called industrial crimes, in that they cannot well be committed except in the course of industrial life. Yet an ordinary crime is not, apart from statutory exceptions, any the less a crime simply because it contains a political or industrial element.[2]

[1] *History of English Law*, Vol. 8, p. 394.

[2] The only purpose for which a criminal act will not be treated as such because of a political element is in order to comply with the rule of inter-

2. The law is one thing: its enforcement quite another. Many people, in the give-and-take of ordinary life, put up with annoyances from their neighbours for which they could doubtless sue, but do not do so for fear of 'making bad blood'. Others commit crimes with impunity, for unless a private person —I had almost said a private busybody—takes it upon himself to prosecute, the police, or someone on a higher rung of the executive ladder, may deem it inexpedient to put in motion the letter of the law. Thus, as Jennings has pointed out, 'Free speech and the right of public assembly are very strictly limited in English law'.[3] But, except in times of national emergency, very considerable latitude is given in both cases, in the wise realisation that it is better that rankling discontents should be voiced in the free air, rather than be driven underground and allowed to simmer there, for that way lie the 'police state' and the *agent provocateur*. The danger, of course, is that a law long unenforced tends to become a law forgotten, and the situation becomes that portrayed by the Duke in *Measure for Measure*:—

> We have strict statutes and most biting laws,
> The needful bits and curbs to headstrong weeds,
> Which for these nineteen years we have let slip;
> Even like an o'ergrown lion in a cave,
> That goes not out to prey. Now, as fond fathers,
> Having bound up the threatening twigs of birch,
> Only to stick it in their children's sight
> For terror, not to use, in time the rod
> Becomes more mock'd than feared; so our decrees
> Dead to infliction, to themselves are dead;
> And liberty plucks justice by the nose;
> The baby beats the nurse, and quite athwart
> Goes all decorum.[4]

The crime and the tort that looms largest in industrial

national law, which has been made part of common law, and sealed by the Extradition Act, 1870, s. 3 (1), that Great Britain is the asylum of those whose political acts or opinions have made their own countries unsafe for them. This rule may, as is shown by *Re Castioni* (1891), 1 Q.B. 149, render it impossible for a foreign government to secure the extradition even of one charged with homicide, if, in the words of Stephen *History of the Criminal Law*, Vol. 2, p. 71), his acts were 'incidental to and formed part of political disturbances'.

[3] *The Law and the Constitution*, p. 234.

[4] Act 1, Scene 3, lines 18–30.

relations is conspiracy. In both its criminal and its civil aspects the law of conspiracy can boast considerable antiquity. Wright cites the Ordinance of Conspirators, of 1308, which 'finally' defines it as consisting in confederacy for false and malicious promotion of indictments and pleas.[5] Holdsworth mentions a statute of 1293, which inaugurates the writ of conspiracy for those who wish to complain of conspirators, and of those guilty of maintenance.[6] Out of the writ develops the action on the case in the nature of conspiracy, which was intended to have, and in at least one case in the Year Books did have, a wider ambit than the circumscribed field of abuse of legal procedure within which it was at first confined. Gradually the crime of conspiracy widened, until it embraced the four classes of acts enumerated by Kenny: (1) agreements to commit a substantive crime, (2) agreements to commit a fraudulent or malicious[7] tort, (3) agreements to commit a breach of contract under circumstances which render it especially injurious to the public,[8] (4) agreements to do acts which, without falling under any of these heads, are nevertheless immoral or, to use a modern expression, 'anti-social'.[9] Classes (3) and (4), and later, with the decision in *Lumley* v. *Gye*,[10] (2) also, have sufficient capacity to embrace many actions arising out of industrial disputes. But here the point must be made that for the crime of conspiracy, as with all crimes that are *mala in se*, wrongful intention is an essential ingredient, and this requirement communicated itself to conspiracy viewed as a tort, though this was not enunciated, nor indeed fully realised, until the judgment of Atkin, L.J. in *Ware and de Freville* v. *Motor Trade Association*.[11] The necessity for an overt act belongs only to the tort of conspiracy, the necessity for malice is common to the tort and the crime.

Interesting as is the subject of conspiracy in general, it is

[5] *Law of Criminal Conspiracies and Agreements*, p. 2.
[6] *History of English Law*, Vol. 3, p. 402.
[7] (or violent?)
[8] *Vertue* v. *Lord Clive* (1779), 4 Burr 2472. This class of case is eventually crystallised by statute into the crimes consisting of strikes in utility undertakings, *e.g.*, Conspiracy and Protection of Property Act, 1875, ss. 4 and 5 (cessation of work in breach of contract, even by one person, with knowledge that such action will endanger life, or deprive the community of the necessaries of life); Electricity Supply Act, 1919, s. 31, a similar enactment with regard to electrical undertakings.
[9] *E.g.*, *Gregory* v. *Duke of Brunswick* (1843), 6 M. & G. 205.
[10] (1853), 2 E. & B. 216.
[11] (1921), 3 K.B. 40, 90.

probable that it would not have attained to such an important niche in the criminal law and the law of tort had it not been for the growth of trade union activity. Stephen, in his *History of the Criminal Law,* shows that the whole structure of legislation, until comparatively modern times, was directed against any sort of confederation by labourers. The idea that labourers should be able to fix the terms of their own labour or conditions of employment was unknown in the Middle Ages. However, after the Black Death and the consequent dearth of labour, affairs seemed to be moving in the direction of collective bargaining, and, with a little more resolution and coherence among workmen, and a little more dilatoriness on the part of the legislature, the questions that have so troubled the law during the nineteenth and twentieth centuries might have been fought out in embryo in the fourteenth. But in 1349 and 1350 the legislature had recourse to that expedient of direction of labour which was revived, under the Emergency Powers Act, 1939, and put into active operation, first by the Essential Work Order and now by the Control of Engagements Order. Briefly, the statutes compelled those who had not land to work on the land of those who had, for a reasonable wage, to be fixed by special justices of labourers. The statutes, which were several times confirmed and modified, were rigorously enforced.

The first trade union statute, properly so called, was passed in 1424. It was called ' Masons shall not confederate themselves in chapiters and assemblies '. In 1548 was passed the ' bill of conspiracies of victuallers and craftsmen ', for the punishment of victuallers conspiring to sell their victuals at certain prices, and labourers conspiring touching their work. In 1562 we have the famous Statute of Appentices which, as Stephen points out, has a close connection with the history of the Poor Law. It introduced, as Jenks puts it, ' a carefully regulated system of apprenticeship for skilled trades '.[12] It made for improvements in the efficiency of work, but continued the principles of the old statutes, most of which it repealed and replaced, as to the compulsory status of workmen.

In 1720 was passed an Act ' for regulating the journeymen tailors within the bills of mortality ', and similar enactments for other trades followed in 1725, 1749, 1777 and 1795. The

12 *Short History of English Law,* p. 321.

eighteenth century marks the murmurs of a coming storm; on the one hand unions of workmen begin to spring up; on the other, judicial decisions are all directed towards clipping their wings before they have learned to fly. In *R.* v. *Journeymen Tailors of Cambridge*,[13] it was decided that a conspiracy among journeymen to refuse to work under certain wages is an indictable offence. This case is especially interesting as showing that it is the conspiracy which is the gist of the offence, and not the refusal to work.

In 1799 and 1800 we have the first Combination Acts. The Act of 1800 was most repressive. It was directed against every kind of trade combination of masters for the reduction of wages or lengthening of hours as much as of workmen for combining to obtain increases of wages or improvement in their working lives. But this Act was repealed under the influence of the upward surge of Benthamite liberalism, by the Combination Act, 1824, which put the whole subject on a new basis.[14] It provided 'that workmen should not by reason of combinations as to hours, wages, or conditions of labour, or for inducing others to refuse work or depart from work, or for regulating the mode of carrying on any manufacture, trade or business, or the management thereof, be liable to any criminal proceeding or punishment for conspiracy or otherwise under the statute or common law'. By another section it extended a similar immunity to combinations of masters. On the other hand it imposed a penalty of two months' imprisonment for violence, threats, intimidation and malicious mischief. Unfortunately this Act, in the eyes of a majority of the legislature, encouraged labour unrest and strikes, and it was replaced the next year by the Combination Act, 1825. At first sight the two Acts look very much alike, but really the Act of 1825 took a step backwards to repression. It lays its emphasis in a different place, that is to say, on penalties for violence, threats or intimidation, which can be imposed if committed for any purpose which could conceivably interfere with individual freedom of contract on the part of an individual work-

[13] (1721), 8 Mod. 10. I cannot but think that this case militates against Stephen's view that the doctrine of common law conspiracy, as applied to trade disputes, was born as the result of the Combination Act, 1825. He mentions this case, indeed, as a 'possible authority the other way', but it is submitted that it must be regarded as having been of much more moment. (See Stephen, *op. cit.*, Vol. 2, p. 209.)

[14] Dicey, *Law and Opinion in England*, p. 191.

man or with the right of a master to manage his business in the way he thinks fit. Thus, though it does also confer on masters and workmen a limited right to meet together and come to agreements for settling the rate of wages, judges, quite intelligibly, tended to interpret it according to the emphasis it lays on interference with freedom of contract, and considerably to widen the doctrine of common law conspiracy, which had already swept trade union activities into its net, in *R.* v. *Journeymen Tailors of Cambridge*.[15] At the same time Elizabeth's Statute of Apprentices was not repealed,[16] and to all intents and purposes 'workman' was still a status, and industrial disputes were triable by justices of the peace. Workmen really fitted into the ideas—neither of the time of 'Tory optimism' which ushered in the nineteenth century, nor of that of Benthamite individualism which followed on its heels. Right up to the great Trade Union Act of 1871, trade unions were considered as being essentially unlawful associations because their tendency was in restraint of trade. It was decided in *Hornby* v. *Close* [17] that, as they had no recognised status in the eye of the law, they could get no protection against dishonest officials who embezzled their funds. The law as expounded in this case was reversed by the Trade Unions Funds Protection Act, 1869, but this could obviously be but a stop-gap measure. Clearly the time had come for conferring on them a definite legal status. In 1871 they stood at the cross-roads; were they to be incorporated or were they to be trusts? Parliament, in the Trade Union Act of 1871, decided in favour of the latter alternative. The Act provides for the registration of trade unions, for the vesting of their property in trustees, and for the civil and criminal responsibility of those trustees. But let us at this point notice the remark of Lord (then Mr.) Balfour in the House of Commons in 1904 in reply to a lawyer who had objected to his referring to trade unions as corporations: 'I know that', retorted Mr. Balfour, 'I am

[15] (1721), 8 Mod. 10.

[16] It was repealed in 1875, by s. 17 of the Conspiracy and Protection of Property Act, 1875. One interesting repercussion of this repeal was in the law of charitable trusts: in *Re Campden Charities* (1881), 18 Ch. D. 310, 326, it was held that a scheme made by the Charity Commissioners for devoting part of a fund designed in 1643 for apprenticing poor boys in the parish of Kensington, to educational purposes, should be upheld.

[17] [1867] L.R. 2 Q.B. 153.

talking English, not law'. Maitland calls this 'an admirable reply'.[18] It was indeed an admirable reply, which goes far to explain the philosophy underlying the decisions in *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants,*[19] that trade unions could be sued in tort in their registered name, and damages recovered from union funds, and in *National Union of General and Municipal Workers* v. *Gillian,*[20] that a trade union can itself maintain an action for libel. Whether a body be trust or corporation, it cannot be treated as a lifeless automaton. Once personality is breathed into it, it must, within the range of those physical limitations which prevent the full realisation of corporate personality in criminal law,[21] be endowed with the powers and afflicted with the liabilities which attach to normal persons.

In 1875 was passed, at the instance of Disraeli's Tory Government, the Conspiracy and Protection of Property Act. The points to notice about this important Act are as follows:—

1. The orbit of the law of criminal conspiracy becomes considerably narrowed by the removal from it of agreements to do anything 'in contemplation or furtherance of a trade dispute between employers and workmen'. Such agreements are no longer to be indictable as conspiracies of the Act agreed upon would not, if committed by one person, be punishable as a crime. So Kenny's class (4) of criminal conspiracies is the poorer by the subtraction from it of agreements connected with trade disputes.

2. But it is expressly laid down that no change is made in the law relating to riot, unlawful assembly, breach of the peace, or sedition, or *any offence against the State or Sovereign.* These last seven words, it is submitted, may still render strikes illegal, and may show that the fears of those who condemned the repeal of the Trade Union and Trade Disputes Act, 1927 by the Act of 1946[22] are without firm ground.

3. The Act enumerates certain acts which will be criminal, if done in order to compel any person to do anything which he has a legal right to do. Some of these would in any case be crimes at common law, whatever their motive, *e.g.,* using violence

[18] *Collected Papers,* Vol. 3, p. 308.
[19] [1901] A.C. 426.
[20] [1946] K.B. 81.
[21] See R. S. Welsh in 62 *Law Quarterly Review,* p. 345.
[22] Trade Disputes and Trade Unions Act, 1946.

or injuring property; others, such as 'watching and besetting' a house, or hiding tools, would not; as a matter of fact such things would hardly be done outside the occasions of trade disputes. But the Act then goes on to legalise *peaceful picketing*, in these words, 'Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this sub-section'.

4. As we have seen, the Act contains a provision that a cessation of work, even by one person, employed in the supply of gas or water, is criminal, if he has reason to believe that his action may deprive the local inhabitants, to a great extent, of their supply of gas or water.

The result of the passing of so large a part of the law of industrial relations from the orbit of criminal law is that the centre of gravity shifts to the law of torts. In 1853 the great case of *Lumley* v. *Gye* [23] had been decided. Wightman, Erle and Crompton, J.J. held that an action lies for maliciously procuring a breach of contract to give exclusive personal services for a time certain, provided that the procurement be during the subsistence of the contract, and produces damage: and that to sustain such an action, it is not necessary that the employer and employed should stand in the strict relation of master and servant. They were, moreover, inclined to think that the action would lie for the malicious procurement of the breach of *any* contract, if by the procurement damage was intended to result and did result to the plaintiff.[24] Coleridge J. delivered a learned dissenting judgment. His opinion was that the action for procuring a third person to depart from his engagement is founded on the Statute of Labourers, and is strictly confined to cases where the employer and employed stand in such relation of master and servant as was covered by that statute; and that in all other cases the remedy for a breach of contract is only on the contract, and against those privy to it; and a dramatic

[23] (1853), 2 E. & B. 216.

[24] These dicta were followed in *Exchange Telegraph Co.* v. *Gregory* (1896), 1 Q.B. 147; *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A.C. 239; *National Phonograph Co.* v. *Edison-Bell Consolidated Phonograph Co.* (1908), 1 Ch. 335; and *Goldsoll* v. *Goldman* (1914), 2 Ch. 663.

performer never came within the Statute of Labourers. The difference resolves itself into this: the majority recognised, or at any rate were groping their way towards the recognition, that when A makes a contract with B he gains in effect two rights, one a personal right against B for the fulfilment of the contract, the other a real right against all the world, not to be disturbed in the enjoyment of it. As Lord Herschell pointed out in *Allen* v. *Flood*,[25] the wider principle, that the action for damages for procuring breach of contract was not confined to contracts of service, but applied to all contracts, was definitely adopted in *Temperton* v. *Russell*[26] in 1893. Unfortunately in that case Lord Esher used some expressions suggesting that it is equally an actionable tort for A to induce B *not to enter* into a contract with C. This would be a big extension of *Lumley* v. *Gye*,[27] wherein the majority insisted that no action could be grounded on a merely inchoate contract right, and is opposed to the old doctrine of the *Case of the Gloucester Grammar School*,[28] where the defendant set up a rival school near to that of the plaintiff with such success that the plaintiff had to reduce his fees, but he was held to have no remedy. The remarks of Lord Esher were finally repudiated by the House of Lords, by a majority, in *Allen* v. *Flood*.[29] Here there was no contract between the Glengall Iron Co. and Flood, though being a good workman he had doubtless every moral right to assume that his casual employment would not be terminated until the job was concluded. But he was a shipwright who, though at the same time working only on his proper job, had previously worked for another firm on iron. As this employment was contrary to a strict rule of the boilermakers' union, his mates refused to go on working unless he were discharged. One of them sent for Allen, an official of the union, who informed Halkett, the manager, that the men would definitely refuse to work with any shipwright who had

[25] [1898] A.C. 1, 126.
[26] (1893), 1 Q.B. 715.
[27] (1853), 2 E. & B. 216.
[28] (1410), Y.B. Hil. 11 Hen. 4, f. 47, pl. 21. See Winfield, *Textbook of the Law of Tort*, 3rd ed., p. 582. Dist. fairs, which are franchises; and so to allow another fair to be set up so near to an already existing fair that it abstracted its custom, is an actionable nuisance: see *Morpeth Corporation* v. *Northumberland Farmers' Auction Mart* (1921), 2 Ch. 154; *Hammerton* v. *Earl of Dysart* (1916), 1 A.C. 57 (ferry); Holdsworth, *History of English Law*, Vol. 1, p. 535.
[29] [1898] A.C. 1.

handled iron. The manager, faced with the probability of a disastrous stoppage, discharged Flood, who sued Allen, not for procuring the breach of his contract, for he had not, but, in reliance on the expressions of Lord Esher, for interference with his freedom to dispose of his labour as he would. The majority held that he had no remedy, for Halkett was within his rights in dismissing him, and even had Allen been guilty of malice this could make no difference, for it had been decided three years earlier, in *Mayor of Bradford* v. *Pickles*,[30] that malice cannot render actionable what is not actionable without malice. Lord Halsbury, in his powerful dissenting speech, stressed the point that Halkett was impelled by coercion of his will to do an act, albeit a lawful act, which without such coercion he would not have done. Lord Herschell, on the majority side, pointed out that the 'maliciously' in the declaration of *Lumley* v. *Gye*[31] meant no more than 'knowingly': clearly no tort would be committed by A who persuaded B to do some act which in fact constituted a breach of contract which was, however, unknown to A.

A very different case was *Quinn* v. *Leathem*.[32] This arose out of an early attempt by officials of the Belfast Journeymen Butchers and Assistants Association to enforce the 'closed shop', and indeed to go further than this, for they refused to admit to membership Leathem's workmen, though he was quite willing to pay all fees, fines, etc. demanded. The defendants threatened to call out the employees of Munce, one of Leathem's largest customers, though he had no actual contract with him. Munce, bowing to the threats, refused to deal with Leathem any more until the dispute with the union was settled. The House unanimously decided in favour of Leathem.

Now at that stage one is left with the idea that the difference between the two cases lies not in the presence or absence of combination or of malice, but in the point that while Allen was doing a lawful thing, though possibly (the Lords taking different views of the facts) with a malicious motive, Quinn and his friends were

[30] [1895] A.C. 587.

[31] (1853), 2 E. & B. 216. The word may, however, have another significance, not that evil intent is necessary to enable such an action to be brought, but that the presence of good intent may justify X in breaking a contract between Y and Z; *Brimelow* v. *Casson* (1924), 1 Ch. 302; but see *Camden Nominees* v. *Forcey*, [1940] Ch. 352.

[32] [1901] A.C. 495.

acting unlawfully, because they were employing unlawful means. It is not until 1921 that it was recognised, by Atkin, L.J. in *Ware and de Freville* v. *Motor Trade Association*,[33] that where there is a combination, malice can make actionable that which was without such combination not actionable, and this view receives endorsement from the speech of Lord Dunedin in *Sorrell* v. *Smith*,[34] who reminds us of the fact that conspiracy is essentially a crime and that for crime unlawful intention is necessary.

Holdsworth considered that this case had to a large extent settled the existence and ambit of the tort of conspiracy.[35] But he could not foresee modern developments. For trade disputes nowadays so often arise out of differences not between employers and employed, but between two traders, one of whom has made common cause with a trade union, whose interests are equally threatened, though possibly in a very different way, by the actions of his rival, or between two unions, one of whom enlists the assistance of an employer, or Federation of Employers, in order to enforce a 'closed shop', the first step towards which is the elimination of the rival union. The former situation constituted the alignment of parties in *Crofter Hand Woven Harris Tweed Co.* v. *Veitch*.[36] The House held that the *predominant* purpose of concerted action between the Transport and General Workers' Union and the original producers of tweed cloth on the island of Lewis, which operated adversely to the interests of the rival modern producers, was the legitimate promotion of the trade interests of the persons combining, and so the rivals had no remedy. The vital word is 'predominant', which underlines the mixed motives which are always at the back of men's actions, and shows us that cases of conspiracy must often be extremely complicated, for a predominant motive is hard to pick out.

I must now retrace my steps. The dissatisfaction felt by the trade union world with the decision in *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants*[37] led to the Trades Disputes Act, 1906. The main points are as follows:—

[33] (1921), 3 K.B. 40, 90.
[34] [1925] A.C. 700, 723.
[35] *History of English Law*, Vol. 8, p. 397.
[36] [1942] A.C. 435, exhaustively analysed by Professor Stone in *The Province and Function of Law*, pp. 620–626.
[37] [1901] A.C. 426.

1. As the Conspiracy and Protection of Property Act, 1875 withdraws combinations in contemplation or furtherance of a trade dispute from Kenny's category (4) of criminal conspiracies, so this Act withdraws such combinations from the field of tort, unless the act done (for in tort an overt act is necessary) would be actionable without such combination.

2. The right of peaceful picketing is placed outside the law of tort.

3. The doctrine of *Lumley* v. *Gye* [38] is no longer to apply to acts done in contemplation or furtherance of a trade dispute.

4. The *Taff Vale Case* [39] is reversed. No action in tort will lie against a trade union, nor can a plaintiff fall back on a representative action against its officials. This part of s. 4 contains no reference to trade disputes, and the result is, as decided in *Vacher* v. *London Society of Compositors,*[40] that a trade union can now publish a libel, or commit any other tort, with complete impunity.[41] But it cannot fairly be said that this very privileged position has ever been wantonly abused.

5. This Act contains what the Act of 1875 did not contain, a definition of the term 'trade dispute', as 'any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of employment, or with the conditions of labour, of any person, and the expression "workmen" means all persons employed in trade or industry, *whether or not in the employment of the employer with whom a trade dispute arises'*. The last fifteen words were doubtless inserted to get rid of *Quinn* v. *Leathem,*[42] for Lord Macnaghten had there expressed the opinion that the acts were not done 'in contemplation of or

[38] (1853), 2 E. & B. 216. The section (3) also gives the *coupe de grâce* to the dicta of Lord Esher in *Temperton* v. *Russell* (1893), 1 Q.B. 715, by providing that an act done in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it is 'an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital on his labour as he wills'.

[39] [1901] A.C. 426.

[40] [1913] A.C. 107; see Vinogradoff, *Common Sense in Law,* p. 91.

[41] There is a saving, in sub-section (2), in respect of the liability of the trustees of a trade union to be sued in certain events provided for by section 9 of the Trade Union Act, 1871—but such an action can no longer be brought in respect of a tortious act committed by or on behalf of the union in contemplation or furtherance of a trade dispute.

[42] [1901] A.C. 495, 511.

furtherance of a trade dispute' at all, in that Leathem had no quarrel with his workmen.

In 1926 the General Strike broke upon us. Was it or was it not illegal? Sir John Simon (as he then was) urged that it was, Professor Goodhart that it was not.[43] My own view is that it was in contemplation or furtherance of a trade dispute, though possibly in rather a roundabout way. Could it not be said that A (the members of the T.U.C.) decided to call out B (the railwaymen, etc.) from their employment under C (the railway companies, etc.) with the object that D (the general public) would be so much inconvenienced that they would bring pressure on E (the Government) in its turn to bring pressure on F (the coal-owners) to increase the wages of G (the miners)? The suggestion that it was in any way criminal has, it is submitted, been sufficiently answered by Professor Goodhart. So great, however, was the respect of trade unionists for the law that a bare dictum (for it was no more) by Astbury J. in *National Sailors' and Firemen's Union* v. *Reed*[44] that the General Strike was illegal provided a very powerful reinforcement to their growing determination to bring it to an end. Clearly legislation was inevitable. The Government might have done one of two things, either leave things as they were, on the ground that a General Strike was already illegal, or re-establish the authority of the *Taff Vale Case*[45] by repealing s. 4 (1) of the Trades Disputes Act. They did neither. Instead, they passed the Trade Disputes and Trade Unions Act, 1927. The provisions as regards trade disputes—for the part dealing with trade unions, of which the chief provision is the substitution of the principle of 'contracting in' for that of 'contracting out' in respect of the political levy, falls outside my subject—may be summarised as follows:—

1. Certain strikes and lock-outs are declared illegal. But in order to be illegal a strike must (1) have some object other than or in addition to the furtherance of a trade dispute within the trade or industry in which the strikers are engaged, *and*[46] (2) be designed or calculated to coerce the government either directly or by inflicting hardship on the community. Persons who declare,

[43] *Essays in Jurisprudence and the Common Law*, p. 226.
[44] [1926] Ch. 536.
[45] [1901] A.C. 426.
[46] Professor Stone, through an unfortunate *lapsus calami*, stultifies this provision by writing 'or' instead of 'and'; *op. cit.*, p. 629.

instigate, incite others to take part in or otherwise act in furtherance of illegal strikes or lock-outs were guilty of a criminal offence.

Furthermore, acts done in contemplation or furtherance of an illegal strike lost the protection of the Trade Disputes Act, 1906.

2. It contained a new provision on the subject of picketing, applicable to all strikes, and not only those declared illegal by the Act. It enumerates certain acts which will be unlawful under the heading of intimidation, but it is very questionable how far it makes anything of this nature unlawful which would not have been equally unlawful under the Act of 1875, and the Trade Disputes Act, s. 2 of which certainly contains nothing to legalise anything falling outside the ambit of the epithet ' peaceful '.

As to illegal strikes, it would certainly have proved in practice almost impossible to launch a prosecution with any hope of success, except in the case of a strike nakedly and exclusively political, for example in order to force the Government to intervene in a war between Ruritania and Baratavia. As far as I know, this part of the Act has only once been invoked, in *R.* v. *Tearse*,[47] where, in the event, the conviction was quashed on the ground that the acts were done, not in furtherance of, but merely in preparation for, an illegal strike. Now, by the Trade Disputes and Trade Unions Act, 1946, the Act of 1927 has been repealed, and, as far as trade disputes are concerned, the situation produced is that in ' The Jackdaw of Rheims ', ' nobody seemed one penny the worse '. We simply go back to the Acts of 1875 and 1906. Violence and intimidation are certainly not legalised, nor will a purely political strike be protected by either Act, nor will an ' offence against the State or Sovereign ', which, as we have seen, is expressly declared illegal by the Act of 1875. In conclusion, one more paraphrase of a quotation, there have been two parturitions of mountains, in 1927 and in 1946, and on each occasion the birth has been that of a very ' ridiculous mouse '.

[47] [1945] K.B. 1.

9

LA PLACE DE L'HOMME DANS LA CONSTRUCTION DU DROIT INTERNATIONAL[1]

A. de La Pradelle

S'il est vrai qu'une science est une langue bien faite, rien n'est indifférent, même un vocabulaire; il en est un dont une discipline, qui ne sait plus, à l'heure actuelle, comment se nommer, souffre au delà de toute expression. Droit des gens, droit international, suivant qu'on prend tel ou tel terme, elle s'engage dans telle ou telle orientation, et, de ces orientations, il en est une qui peut être funeste, car elle l'empêcherait de remplir sa mission, qui, bien comprise, doit être de procéder à l'organisation de l'Ordre juridique du monde.

Il y a deux Ordres dans le monde : l'un, purement physique, des forces naturelles; l'autre essentiellement moral, où le corps et l'âme se rejoignent sous l'arbitrage de l'esprit. Dans le premier, la nature impassible fait son oeuvre sous des normes à jamais fixées. Dans le second, les hommes, individuellement ou collectivement, choisissent leur destin. Les nécessités de l'existence, les finalités de l'être les amènent d'époque en époque à créer des *institutions* protectrices pour les aider à poser et suivre des *normes* peu à peu découvertes et proclamées, par la formation volontaire d'une harmonie, qui, dans le Cosmos moral, doit correspondre autant qu'il se peut à celle du Cosmos physique.

Après avoir trouvé dans la paix romaine un ordre qui servit à la construction, sur la philosophie stoïcienne, d'une paix chrétienne, aussi louée par Auguste Comte que par Joseph de Maistre, l'humanité connut, avec la nécessité de mettre fin au chaos féodal, la formation de royaumes qui, s'émancipant du Pape et de l'Empereur, durent, pour dérober, d'une manière exclusive, le pouvoir aux Seigneurs, insister sur leur souveraineté, considérée comme un suprême pouvoir de commandement et

[1] Conférence donnée à l'Université de Londres, à l'University College, London, le 25 Novembre, 1947.

de contrainte. L'Etat, à ce moment, prend une position telle que devant lui l'homme disparaît.

C'est alors que le vocabulaire change.

Rome avait un cérémonial de guerre et d'ambassade, *jus fetiale,* et, à côté pour régler la condition pérégrine, un *jus gentium,* formé des droits qui, partout reconnus, étaient issus de la nature humaine. Le Jurisconsulte romain avait dit : *'Quod naturalis ratio inter omnes homines constituit, vocatur jus gentium'.*[2] Incidemment le grand dominicain de Salamanque, Vitoria, dans sa leçon *De Indis* (1539),[3] inscrit *omnes gentes.* Le juge anglais des prises Zouche (1650)[4] répète : *jus inter gentes* et Bentham[5] (1789) reprend : *International Law, droit international.* Le nom fait fortune. Quand *jus gentium* devient *jus inter gentes* et que *gens* se traduit par Etat, de graves conséquences apparaîssent.

Par la suppression de *l'inter homines* dans la définition du *jus gentium* de Gaius, une interprétation tendancieuse élimine l'homme du droit des gens. Il ne reste plus que des Etats. Par l'homme en dehors de l'Etat, se faisait la liaison avec un droit supérieur, dont l'autorité s'imposait à tous les hommes, à tous les groupes, *homines, gentes, populos,* mais ne naissait d'aucun. L'homme disparu, toutes les formations naturelles sortent de l'horizon. Il ne reste plus que l'Etat souverain, Prince de Machiavel, Leviathan de Hobbes, Dieu de Hegel, surpassé par le *Volk* de Hitler. Et, dans la langue du droit *international,* mieux nommé *interétatique,* il n'y aura plus sur la scène du monde que des Etats, tandis que, dans la réalité politique, leur droit de commander et de contraindre, les constituants souverains, les laissera sans aucune relation avec une obligation supérieure. Le droit, au lieu de s'imposer à l'Etat, dans la mesure de son devoir envers l'homme, n'existera que dans la mesure de son devoir envers d'autres Etats, qui, ne consultant que leurs intérêts particuliers, souvent différents, parfois opposés, se priveront, pour les unifier, de ce dénominateur commun, qui est l'homme.

Sans doute une telle situation eut raison d'être et valeur

[2] *Institutes,* I, p. 21.

[3] Jean Baumel, *Les leçons de Francises de Vitoria,* édition critique et traduction, Montpellier, 1936, p. 168. *De Bello contra Indis,* Leçon prononcée en 1539.

[4] *De jure inter gentes. Pars Prima,* s. 1, *dans Juris et Judicii fecialis, sire juris inter gentes,* éd. Holland (Carnegie, Washington, 1911).

[5] *Principles of Morals and Legislation.*

pratique : dans la lutte contre la féodalité, d'abord, et, plus tard, pour maintenir, de place en place, un ordre local. Mais en se concentrant dans une institution particulière, au refus de l'ensemble de l'humanité, elle contredirait la nature. Plus que les constructions du pouvoir, de l'ambition et de l'orgueil, ce sont les nécessités de la Vie qui l'emportent. Pour le redressement de l'ordre général du monde, l'homme, que l'Etat tente vainement d'en chasser, y reparaît peu à peu ; ce qui se montre à maints égards : dans la définition du droit ; dans l'énumération de ses sujets ; dans l'approfondissement de son fondement ; dans le rappel, à la base du droit des gens, de l'ancien droit naturel ; enfin au lendemain de la seconde guerre mondiale, dans une grande espérance de rénovation scientifique.

* * *

Jusqu'à ces derniers temps l'opinion dominante, pour déterminer le droit international, faisait intervenir l'Etat à l'exclusion de l'homme : ' Le droit des gens ou droit international ', enseigne Louis Renault, en 1879, ' est le droit des nations ou des Etats, l'ensemble des règles destinées à concilier la liberté de chacun avec celle des autres '.[6] ' Qu'est ce que le droit international ? ' demande Charles Evans Hughes,[7] s'adressant, avec son autorité de juriste et d'homme d'Etat, à l'Association du Barreau de New-York, le 16 janvier 1930. Et il répond : ' C'est le corps de principes et de règles que les Etats civilisés considèrent comme obligatoires dans leurs rapports entre eux '. ' Il n'y a pas de mystère sur le droit international, déclare le Secrétaire d'Etat Hull à l'ambassadeur du Mexique à Washington le 22 août 1938,[8] il n'est rien de plus que la reconnaissance entre nations des règles de droit et de correction telles qu'ordinairement établies entre les individus et qui sont essentielles aux rapports d'amitié '. Dans son arrêt n° 9, (Affaire du Lotus), (7 septembre 1927), la Cour Permanente de Justice internationale affirme : ' Le droit international régit les rapports *entre* des Etats indépendants '. Inutile de procéder à d'autres citations. Elles seraient multiples.

C'est la conception classique du XVIIIème siècle au XXème.

[6] *Les Œuvres de Louis Renault,* Éditions Internationales, Paris, 1932, 1, p. 6.
[7] *The Pathway of Peace,* New York, 1925, pp. 3, 8. *American Bar Association Journal,* 16, p. 151.
[8] *Department of State Press Release,* August 25, 1938.

Conception d'autant mieux assise qu'elle invoque des titres plus anciens depuis le juge anglais Zouche dans son *De jure feciali sive de Jure inter gentes* jusqu'au droit international de Bentham. En 1920 le jurisconsulte hollandais J. de Louter [9] en affirme, dans son exclusion de l'homme, la force et la vérité : ' Le droit international règle exclusivement les rapports entre Etats, non entre individus ; il n'a pas son origine dans la *naturalis ratio* qui l'expose à toutes les diversités d'opinions '.

Ainsi se trouve célébré, à l'encontre du *jus gentium,* devenu le droit des gens, le *jus inter gentes* devenu droit international. Mais ce que de Louter appelle la vérité, c'est précisément l'erreur. Cette étroitesse de formule, qu'il regarde, pour le développement du droit, comme une richesse, n'est au contraire qu'une pauvreté. Du jour où la conception du droit des gens comme un droit interétatique entre dans l'histoire, tout un développement de l'Ordre général du monde s'arrête, dans la stagnation et la torpeur. Mais une formule, si forte et si nette qu'elle soit, frappée par Bentham comme une monnaie, ne saurait, quand elle va contre la vie, longtemps avoir cours. Déjà, à la fin du XIXème siècle, elle paraissait trop brève. Un grand jurisconsulte, trop vite oublié, Bluntschli, dans son *Droit international codifié,* en 1869,[10] définit ainsi le droit international : ' L'ensemble des faits et des principes reconnus qui réunissent les divers Etats en associations juridiques et humanitaires, et qui assurent en outre aux citoyens des divers Etats une protection commune pour les droits généraux résultant de leur qualité d'homme '. Sentant l'imperfection de la définition courante, d'autres auteurs, sans procéder par une énumération des chapitres du droit des gens, comme au VIIème siècle Isidore de Séville,[11] se placent, comme Grotius, en 1645, dans son *De Jure belli ac pacis,* au point de vue de la fonction du droit. Dans la même ligne que Grotius, un autre auteur, beaucoup plus moderne, l'Américain Ellery C. Stowell [12] (1931), présentant l'ensemble du droit international, le détermine par sa fonction :

9 J. de Louter, *Le droit international public positif,* Oxford, 1920, I, p. 3.
10 *Le droit international codifié, trad.* Lardy, 3e éd., Paris, 1881, p. 55.
11 *Originum,* 5, p. 6. Jus gentium est sedium occupatio, ædificatio, munitio, bella, captivitates, servitutes, postliminia, fœdera pacis, induciæ, legatorum non violandorum religio, connubia interalieni genus prohibita.
12 *International Law : a restatement of principles,* New York, Holt, 1931, p. 6 à 10.

donner des lois à la guerre ; des règles au commerce ; des droits à l'humanité, ce qui lui permet de conclure par cette définition, digne de Vitoria : ' Afin de faciliter les échanges entre habitants de différentes régions de la terre et les garantir dans la pacifique jouissance de leur sûreté personnelle et de leurs biens, le droit international règle le droit des individus de vivre associés en communautés politiques de leur choix '. Et il continue : ' On peut définir le droit international comme un ensemble de règles observées et mises en vigueur par les Etats afin de conserver la paix des nations et de faciliter le commerce international '.

Au même moment, James W. Garner,[13] Snow,[14] proposent de traduire plus exactement les vrais caractères de ce droit en le nommant super ou supra-national. Seule la nouveauté de ces termes effraie ; mais la nécessité de ne pas s'enfermer dans l'étroite formule que célèbre de Louter ne fait de doute pour personne. Après avoir rappelé l'ébranlement du droit inter-étatique par l'attaque individualiste de l'Etat chez Duguit,[15] Krabbe,[16] Kelsen,[17] Scelle,[18] l'auteur du plus récent traité d'ensemble, changeant lui-même le nom jusqu'alors suivi dans celui de droit moderne des nations[19] declare : ' Quoi qu'il en soit, il reste vrai, suivant le mot de Sir John Fischer Williams, qu'il est clair que les relations internationales ne se limitent pas aux relations entre Etats. La fonction du droit international est de donner une base légale à l'ordonnancement des relations internationales. La nature traditionnelle de cette loi la liait aux actualités des siècles passés où les relations internationales se limitaient aux relations entre Etats. Les actualités ont changé, la loi change. La loi des nations est la loi applicable aux Etats dans leurs relations mutuelles et aux individus dans leurs relations avec les Etats '.

Ainsi l'homme tend de plus en plus à apparaître là où précisément on prétendait effacer jusqu' à son nom dans la définition du droit qui s'applique à l'universalité du monde.

[13] *Limitations on National Sovereignty in International Relations, American Political Science Review,* 19 (1925).
[14] *Law of Nations, American Journal of International Law,* 6 (1912), 894.
[15] Duguit, *Traité de droit constitutionnel,* 3e éd., 1927, p. 713.
[16] Krabbe, *L'idée moderne de l'État,* Rec. des Cours de la Haye, 1926, 3, 514.
[17] Kelsen, *General Theory of Law and State.*
[18] Scelle, *Règles générales du droit de la paix,* Rec. des Cours, 1933, 4, 343.
[19] Philip C. Jessup, *A Modern Law of Nations, an Introduction,* New York, 1948, p. 15.

C'est avec un véritable étonnement qu'on lira désormais chez les classiques du XIXème et du XXème siècles qu'à la différence de l'Etat, sujet du droit international, l'homme en est simplement l'objet. Ni Vitoria, ni Grotius n'ont jamais, entre l'homme et l'Etat, mis cette différence écrasante pour le premier vis-à-vis du second. C'est à tort que de Louter présente le Dominicain de Salamanque comme ayant intentionnellement substitué, dans la formule de Gaius, *Jus inter gentes* à *jus inter homines,* pour chasser l'homme de l'ordre général du monde devenu simplement un ordre interétatique. Pour Vitoria, disciple de Saint-Thomas, *gentes* n'a jamais eu qu'un sens humain, l'ensemble des générations, et non, comme *Etat,* un sens politique. Dans la *Tertia pars* du *De Indis,* il cherche le titre de l'Espagne à la conquête de l'Amérique : il le trouve dans le refus par les Indiens d'un droit primordial, celui de la libre circulation pour l'échange des produits, des idées, à travers toute la terre, droit des individus et non pas des Etats. Le montrant entre l'Espagne et la France, pour en mieux faire ressortir, entre l'Espagne et les Indiens, la légitimité, il ne l'attribue ni au Roi d'Espagne contre le Roi de France et réciproquement, mais aux Espagnols vis-à-vis de la France et réciproquement aux Français vis-à-vis de l'Espagne : *'Non liceret Gallis prohibere Hispanos a peregratione Galliæ; ergo nec barbaris'.* En 1625, Grotius également se place 'sur les affaires de la guerre ou de la paix' en présence de 'ceux qui ne reconnaissent point de droit civil commun, par lequel leurs différends puissent et doivent être terminés; tels que sont une multitude de gens qui ne forment point de communauté ou les personnes qui sont membres de différentes nations, soit simples particuliers, soit rois ou autres puissances revêtues d'une autorité égale à celle des rois, comme les principaux de l'Etat et le corps du peuple dans les gouvernements républicains'.[20]

Mais bientôt l'Etat occupe seul le devant de la scène : 'Les nations ou Etats sont des corps politiques, des sociétés d'hommes unis ensemble pour procurer leur salut et leur avantage, à force réunie'. Ainsi parle Vattel, pour qui 'le droit des gens est la science du droit qui a lieu entre les nations ou Etats, et des obligations qui répondent à ce droit'.[21] A l'intérieur, la

[20] Livre 1[er], chapitre 1, La guerre et le droit, § 1.
[21] *Le droit des gens, Préliminaires,* § 3.

nation garde des droits envers son prince. A l'extérieur, le peuple, qui peut déposer son prince, s'absorbe en lui qui le représente en prenant la plénitude de son droit. Lorsque le droit international est violé dans la personne d'un de ses ressortissants, l'Etat se manifeste pour le faire respecter, mais il ne le laisse pas présenter comme un droit de l'homme, il le présente comme un droit de lui-même, atteint dans la personne de ses nationaux : ' Quiconque, dit Vattel (Livre 2, chapitre 6), maltraite un citoyen, offense indirectement l'Etat qui doit protéger ce citoyen. Le souverain de celui-ci doit venger son injure, obliger, s'il le peut, l'agresseur à une entière réparation, ou le punir, puisque autrement le citoyen n'obtiendrait pas la grande fin de l'association civile, qui est la sûreté '. Ce système, dont les applications sont multiples, est en accord parfait avec l'étroite conception d'après laquelle l'Etat seul est sujet d'un droit dont l'individu n'est plus que l'objet.

D'un pareil système, au point de vue logique, l'erreur est évidente : n'y a-t-il pas contradiction à considérer, d'une part, l'Etat comme la victime du préjudice, d'autre part l'intérêt du particulier dans la mesure du dommage? Au point de vue pratique, l'inconvénient est manifeste. La violation, par l'Etat, d'un droit international dans la personne d'un ressortissant étranger, s'il demeure sur le plan des intérêts privés, n'est jamais qu'un incident mineur. En faire une question d'Etat, c'est au contraire élever le problème, agrandir le différend, envenimer les rapports internationaux, intimider les faibles dans la défense de leurs droits, donner aux forts des prétextes pour des coups de force (affaires Pacifico, Croft, Luders, Blocus du Venezuela).[22] Tous ces inconvénients seraient évités si l'individu reconnu sujet de droit pouvait directement s'adresser, comme les Etats eux-mêmes, aux tribunaux internationaux. Mais le statut de la Cour Permanente de Justice internationale en 1920, celui de la Cour Internationale de Justice en 1945 s'accordent dans la répétition d'un même article 34 : ' Seuls les Etats ont qualité pour se présenter devant la Cour '. Vainement, en 1920, deux membres du Comité des Dix chargé de préparer le statut de la Cour demandèrent-ils l'accès de l'individu.[23] Malgré quelques

[22] Maximilian Koesler, *Government espousal of private claims before international tribunals,* The University of Chicago Law Review, February, 1946, *et Nouv-Revue de droit international privé* (C.R.) 1946, p. 843. Charles Carabiber, *Les jurisdictions internationales de droit privé,* p. 95.
[23] Carabiber, *supra* cit., pp. 101–102.

précédents celui notamment de l'éphémère Cour de Justice interaméricaine, une opposition leur fut faite, basée, notamment, sur la définition d'après laquelle le droit international n'était qu'un droit entre Etats.

Cependant l'individu monte peu à peu vers la gestion personnelle de ses propres intérêts dans l'administration en justice de la protection étatique. En 1929 les Porteurs Français des emprunts serbes et brésiliens, réclamant le paiement en or, ne peuvent accéder à la Cour que par l'entremise de leur Etat. Mais à côté de l'agent, qui plaide pour la France, ils envoient à la Cour, un avocat particulier. La Pologne nationalise-t-elle, en 1946, les industries françaises? Réclamant une indemnité, le Gouvernement français, après signature d'un protocole fixant une indemnité globale, *ad referendum,* le 12 novembre 1947, convoque les intéressés pour prendre leur avis avant signature définitive. En principe, d'après la doctrine classique, c'est l'Etat seul qui, percevant les fonds attribués pour indemnités, les répartit à sa guise, sous sa responsabilité. Dans l'affaire des nationalisations polonaises, c'est une commission d'arbitrage devant laquelle les indemnitaires auront droit de se faire représenter, qui procédera, entre eux, à la répartition d'une somme que le gouvernement reconnait ainsi comme étant due, non pas à lui, mais à eux.[24] La simple hypothèse qu'avec le doctrine de Vattel le gouvernement pourrait garder les fonds attribués à ses ressortissants, lorsqu'ils auraient changé de nationalité, soit avant, soit pendant l'instance, soit même après mais avant paiement, suffit à porter le dernier coup à cette doctrine. Et celle, plus grave encore, qu'il pourrait être tenté de retenir, pour raison d'Etat, les fonds qu'il aurait reçus,[25] à la suite d'une instance, pour ses ressortissants achève de donner à cette doctrine le coup de grâce. Aussi tout un mouvement se fait-il dans le sens de la reconnaissance du droit, non plus à l'Etat, mais à l'individu. Le reconnaître comme sujet du droit international, même quand il aurait à plaider sous le contrôle et par l'entremise de l'Etat, c'est une question de loyauté, de justice, d'honneur et de paix.

En tous cas, dès maintenant, le cadre étroit de la formule Louter éclate devant les progrès de la responsabilité pénale, mise en lumière par les récents événements de la dernière guerre

[24] Connaissance personnelle.
[25] Affaire Paul de Lesseps, dossier personnel.

mondiale. La première avait été celle de la libération des peuples, sous la formule wilsonienne de leur droit à disposer d'eux-mêmes; la seconde est celle de la libération des individus, sous la formule rooseveltienne de la mise à l'abri de la crainte ou de la misère. Pour sanctionner le Pacte Briand-Kellogg et punir l'agresseur, de multiples déclarations des nations unies élèvent à la hauteur d'un but de guerre la promesse d'une justice organisée pour la répression du crime contre la paix, des crimes de guerre et même d'un nouveau crime—contre l'humanité —(Accord de Londres, 8 août 1945).[26] Ici, dans le droit de la guerre, l'homme, individuellement parait comme responsable, non devant l'Etat dont il relève, pour violation des lois de la guerre édictées par lui conformément aux engagements de La Haye, mais, directement, devant un tribunal international, demandant à l'individu compte de ses actes même lorsqu'ils sont l'accomplissement des ordres exprès des gouvernants dont il relève. Ainsi, sans l'intermédiaire de l'Etat dont il est un ressortissant, le criminel de guerre se voit, en face de la justice internationale, sujet direct et passif du droit des gens.

Enfin il n'est pas jusqu'au chef de l'Etat lui-même qui, privé de la coutumière immunité du souverain, ne se trouve susceptible d'être traduit, avec ses collaborateurs immédiats, devant la justice organisée des gérants d'affaires de la communauté humaine, Alliés, vainqueurs dans la Guerre, Grands de l'O.N.U. dans la Paix. Du même coup l'absolutisme de la souveraineté s'effondre. Au-dessus des Etats, une loi générale des hommes, supérieure à celle des Etats, s'élève et, à travers l'Etat, les lie. Elle ne pénètre pas seulement les relations extérieures entre les peuples, mais jusqu'au plus profond des relations intérieures. Au *jus inter gentes,* qui reste à la surface de la société interétatique, correspond un *jus intra gentes* suivant la formule de Suarez[27] qui pénètre les Etats au plus profond d'eux-mêmes. Du même coup, le monisme triomphe: l'unité du droit, du haut en bas, est accomplie.

Entre le Cosmos moral et les hommes l'Etat cesse d'être un écran.

Le droit international, au sens interétatique du mot, n'est

[26] A. de La Pradelle, *Les Cahiers du Monde Nouveau,* Janvier et Février, 1946.
[27] A. de La Pradelle, *Maîtres et doctrines du droit des gens,* 2e éd., 1948.

plus qu'un fragment d'un droit plus vaste : droit interhumain ; Ordre juridique du Monde. Sujet de droits interétatiques, l'Etat avait été faussement personnifié. A la lumière de la dernière guerre, en face des excès d'un régime qui l'a déifié, il retombe à son rang. Beaucoup plus qu'une personne, c'est une institution, et cette institution n'a pas de droits vis-à-vis d'autres institutions, mais, en collaboration avec elles, des fonctions, pour aider à se développer dans ses droits et devoirs vis-à-vis de ses semblables et de lui-même, au sein de la création, cet être unique, aux aspects divers, qui est l'homme. Là est la vérité, qui ramène le droit positif, né de l'Etat, à sa vraie place qui est seconde. Avant l'Etat-institution, il y a l'homme et, quand il forme l'Etat, il obéit déjà à une loi qui est de nature, et, comme tous les hommes ont tendance à former une organisation du même ordre, l'Etat, au sens romain, est de droit des gens, tandis que les lois, par lui portées, sont de droit civil. C'est à cette hauteur que peu à peu s'élève, à l'heure actuelle, la pensée moderne. Droit naturel, droit des gens, droit civil se dégagent dans leur hiérarchie progressive, en vue d'un développement qui n'attend qu'une compréhension plus nette du devoir social. Le fondement du droit se révèle ainsi dans la nature humaine. L'ordre juridique du monde comprend trois degrés : droit naturel, droit des gens, droit civil, chacun dominant l'autre et l'alimentant. Ainsi nous sommes délivrés de cette contradiction de voir le droit sortir de ceux qui le doivent respecter.

Si l'Etat n'est qu'une institution du droit des gens en vue d'une fin qui est l'homme d'autres institutions peuvent et doivent naître, car si le cercle interétatique est restreint, le cercle interhumain n'a de limites que dans le double cosmos, physique et moral. Il est donc possible de former pour la perfectibilité de l'homme d'autres institutions dès que les premières paraîtraient insuffisantes à leur but. Sur la route de l'humanité l'institution étatique marque une première étape. Une seconde doit s'accomplir. Autour de l'Etat, première institution générale, d'autres institutions générales se forment plus étroites et plus fortes que la Société des Etats dans laquelle elles s'inscrivent : Société des Nations, Organisation des Nations Unies. L'Etat imbu de souveraineté ne pouvait les faire vivre parce qu'elles tendent à le limiter. Elles ne peuvent naître et croitre qu'en vertu d'un

appel profond de l'humanité, forçant, dans son ardent désir de justice et de paix l'Etat, réfractaire au droit, à le subir. Trop longtemps retranché derrière la Bastille de sa souveraineté, il pretendait se refuser à toute règle, à toute justice, qui n'auraient pas son accord. Partant du dogme de la souveraineté, il n'admettait pas à l'extérieur de limites de droit public alors même qu'il en admettait à l'intérieur. La France de la Déclaration des Droits de l'Homme refuse la Déclaration des Droits des Peuples de l'Abbé Grégoire. Les Droits de l'Homme sur le plan extérieur sont à toutes les époques de l'histoire exercés par les Etats d'une manière plus individuelle que collective dans un intérêt particulier. Le primat de l'Etat n'admet, pour le droit de l'homme, que des reconnaissances intéressées: au XVI^e^ siècle la protection de la chrétienté d'Orient naît d'une pensée d'influence et de prestige, l'abolition de la traite en 1815 prend son soutien, pour ne pas dire son origine, dans une pensée britannique de puissance marchande désirant, par la visite en mer, surveiller et tracasser la concurrence des commerces étrangers. Dans l'histoire internationale de droits de l'homme, la liberté morale passe avant la liberté physique. Et quand l'Empereur de Russie pense au désarmement, ce n'est pas seulement pour alléger le fardeau des peuples, c'est aussi pour diminuer les charges d'un budget trop lourd. Pourtant, à cette occasion, dans la circulaire Mouraview des 12–24 août 1898, un mot est prononcé: celui d'un devoir suprême qui s'impose à tous les Etats envers les hommes.

Cette fois la formule [28] interétatique était renversée, brisée. Le préambule de la Convention de La Haye de 1899 relative aux lois et coutumes de la guerre parle de l'humanité, source directe d'un droit qui n'a pas besoin d'être écrit pour s'imposer. Quiconque cherche le fondement du droit international s'épuise à le trouver dans des subtilités sans nombre s'il entend que le droit ne sort que de la volonté des Etats alors qu'il se dégage de la finalité de l'homme. Au préambule de la Charte du 26 juin 1945 éclate l'affirmation d'un droit de l'homme qui désormais se présente (Article I^er^, § 3) comme le soutien du système juridique international. Dans les encycliques pontificales, à la notion du bien commun, principe directeur de toute

[28] A. de La Pradelle, *La Paix Moderne*, Paris, Éditions Internationales, 1947, p. 16.

société, se trouve substitué, par approfondissement de ce bien commun, la finalité de la personne humaine.[29] C'est à son développement que doit tendre l'ensemble des activités étatiques, interétatiques, extra-étatiques. Le moment est venu, pour l'homme, écartant l'Etat, de monter avec des institutions nouvelles au premier rang de la vie internationale.

En 1921, à Rome, l'Institut de Droit international était saisi d'un projet de déclaration des droits et devoirs des nations qui se terminait ainsi : ' Une Société des Etats, dont les membres oublieraient que si l'individu est subordonné à l'Etat dans la Cité, l'Etat, dans le monde, n'est qu'un moyen en vue d'une fin, la perfection de l'humanité, manquerait essentiellement à son devoir en cessant de répondre à son but '. Devant une telle formule, effrayé par sa hardiesse au regard de la définition classique du droit international, l'Institut, après une délibération à mouvements divers, n'osant la repousser mais n'osant pas l'admettre, en ajournait l'étude.

Le 9 août 1947, à Lausanne, dans une déclaration solennelle, il pose en principe que ' la reconnaissance et le respect des droits inhérents à la personne humaine, que doit servir et non asservir l'Etat, sont intimement liés au progrès du droit des gens '. Et cela sous le titre : ' Les droits fondamentaux de l'homme, base d'une restauration du droit international '.

Cette fois, l'homme a repris la place qu'il n'aurait jamais dû perdre.

Et de nouveaux espoirs s'ouvrent au droit des gens.

[29] Lettre encyclique de S.S. Pie XII du 20 October 1939, Summi Pontificatus. *Revue de droit international,* 1940, XXV, p. 259.

10

THE PROTECTION OF HUMAN RIGHTS IN BRITISH STATE PRACTICE

GEORG SCHWARZENBERGER

'What Great Britain is ready to allow, in a point so vital to her pride and to her power, may surely be allowed reciprocally by any other Nation'.
(CANNING, 1822.)

THE international protection of human rights has in recent years become a prominent topic in the literature on international law and on the agenda of international conferences. The explanation is not far to seek. The experiences of two world wars and the 'oppression of dictators'[1] would in themselves be sufficient reasons for such interest. Reassertion of the inalienable rights of man serves as a reminder of the truth that man is not meant to be merely a means to the attainment of transient ends. Though the academic character of the many schemes propounded is only too apparent,[2] they evoke sympathy; for they voice widely felt anxiety over the ever-increasing pressure of organised groups upon the individual, the ultimate basis of life in national and international society. Charters of human rights, suitably formulated in the abstract, have also an undeniable utility value in war and peace. They provide a convenient common denominator for allies who are primarily united in negatives, that is to say by common enmity to their adversaries. Once victory has eliminated the unifying element, the functions of such wartime ideologies change. They become 'artillery of

[1] *United Kingdom Draft of an International Bill of Human Rights*, 1947, p. 3.

[2] See for the proposals of the early war years the present writer's *Power Politics*, 1941, Chap. 28. Cf. also the Resolutions on Human Rights adopted by various Conferences of the Inter-Parliamentary Union since 1923 (*Bulletin of the Inter-Parliamentary Union*, 1947, p. 87 *et seq.*); the *Draft Declaration of the International Rights and Duties of Man* formulated by the Inter-American Juridical Committee, 1946; the *Bill of Human Rights* prepared by the Commission to Study the Organisation of Peace (*International Conciliation*, 1946, No. 426) and H. Lauterpacht, *An International Bill of the Rights of Man*, 1945. Cogent criticism of these schemes is expressed in J. L. Brierly's *Outlook for International Law*, 1944, p. 109 *et seq.*

popular excitation'[3] in the peacetime struggles of world power politics and, like religion in former times, a 'cloak to shadow divers factious designes'.[4]

It is not the purpose of this paper to produce yet another blue print for an international bill of the rights of man. It is rather to emphasise that traditional international law has not been unaware of what is a perennial problem, that it has its own ways of facing the challenge of inroads by the State on human rights, and that British State practice throughout the centuries has coped with the issue in a manner on which, without a basic transformation of international society, any more ambitious schemes are unlikely to improve.

I. INTERNATIONAL LAW AND THE PROTECTION OF HUMAN RIGHTS

Sovereign States, the predominant types of bearers of rights and duties under international law, have so far succeeded in maintaining a practically unchallenged monopoly of exclusive or concurrent jurisdiction over the individual. This position is trenchantly stated in a British Memorandum in the case of the *Finnish Shipping Claims*: 'International law is a law regulating the rights and duties of States *inter se* and creating no rights and imposing no duties on individuals—a view which the Permanent Court of International Justice appears to have definitely adopted'.[5] It goes without saying that this statement is only meant to sum up the object-character of the individual under the *lex lata*. If the present subjects of international law choose to transform the status of the individual from that of an object into that of a subject of international law, they are free to do so. Yet so far they have shown singular reluctance to do so, and romantic pirates or ignoble war criminals, if adduced as proof to the contrary, are only rather weak samples of special pleading. Thus, in principle, the individual remains subject to the domestic jurisdiction of the existing subjects of international law. Whoever wishes to show that he is entitled to take up the case of

[3] Speech of Canning, December 12th, 1826 (H. Temperley, *The Foreign Policy of Canning*, p. 579).

[4] Instructions of Queen Elizabeth to the English Ambassadors to Denmark, 1602 (16 Rymer's *Foedera*, p. 430).

[5] *Official Journal* of the League of Nations, 1932, pp. 816–817. See further the present writer's *International Law*, 1945, Vol. 1, p. 62 *et seq.* and p. 149 *et seq.*

an individual against a subject of international law has to prove the exception to the rule by producing his title. Such a right may accrue to an international person in one of three ways which are not mutually exclusive. The claim may be based on treaties, rules of international customary law, or on general principles of law recognised by civilised nations.

British State practice in this field—as in others—may claim to be of special interest. It offers evidence of unrivalled continuity. For centuries the security of Britain's island position enabled her statesmen to take a less opportunist view of their duties towards individuals under their charge than most States on the Continent could afford to take. The growing strength of Britain in the formative period of international law made it possible for British Foreign Secretaries not only to stand up for British interests, but also to offer guidance regarding the treatment of individuals to nations who were anxious to be in Britain's good books. British governments were powerfully aided in this work—and often stimulated to undertake it—by a virile and vigilant public opinion which felt that it behoved Britain to make her voice heard on behalf of freedom and human rights anywhere within the orbits of the *Pax Britannica*. Thus innumerable British diplomats all over the world at various times have fulfilled the task of keeping the countries to which they were accredited 'on the lines which reasonable people in England will think reasonable'.[6]

II. BRITAIN'S EXAMPLE

In international, as in personal, relations the strongest persuasive force is the example which one sets to others by one's own conduct. This point is clearly brought out in Lord Granville's General Statement of Foreign Policy: 'In the opinion of the present Cabinet, it is the duty and the interest of this country, having possessions scattered over the whole globe, and priding itself on its advanced state of civilisation, to encourage moral, intellectual and physical progress among all other nations. For

[6] Sir Reginald (then Mr.) Leeper (Athens) to Mr. Eden, January 15, 1945 (Cmd. 6592 [1945], p. 2). See for an instance of the sensitiveness of a British Foreign Secretary to public opinion at home, Castlereagh's State Paper of May 5, 1820 (A. and P. [1823], XIX, pp. 69–71). Other notable examples are furnished by the consistent policies adopted by successive British governments regarding the suppression of the Slave Trade.

this purpose the foreign policy of Great Britain should be marked by justice, moderation and self-respect, and this country should in her relations with other States do by others as it would be done by'.[7]

Britain's record in the treatment of foreigners and colonial populations is second to none. A few illustrations will perforce have to suffice to show that Great Britain claimed from other countries protection of human rights only to the extent to which she was herself prepared to grant such treatment to others.

(1) *Freedom of Commerce and the Rule of Law.* It is fitting to introduce this survey by a reference to Magna Carta which granted freedom of commerce to foreign merchants. It is true that this right was seriously limited by the confirmation in the same Charter of the liberties and customs of the English boroughs.[8] It should not, however, be overlooked that, from the twelfth century onwards, commercial treaties provided the means by which, on a basis of reciprocity, foreigners could acquire national and most-favoured-nation treatment.[9] The position reached in the second half of the nineteenth century is well described in a State paper of that period: 'By the existing law of Great Britain all foreigners have the unrestricted right of entrance into and residence in this country and, while they remain in it, are, equally with British subjects, under the protection of the law; nor can they be punished except for an offence against the law, and under the sentence of the ordinary Tribunals of Justice, after a public trial, and on a conviction founded on evidence given in open Court. No foreigners, as such, can be sent out of this country by the executive government, except persons removed by virtue of treaties with other States, confirmed by Act of Parliament, for the mutual surrender of criminal offenders'.[10]

[7] January 12, 1852 (H. Temperley and William M. Penson, *Foundations of British Foreign Policy,* 1938, pp. 183–184).

[8] Sir Frederick Pollock and F. W. Maitland, *The History of English Law,* Vol. 1, 1923, pp. 464–465.
See also Chapter 28 of the Statute of the Staple of 1353 (27 Edw. 3, Stat. 2) and on the trial of aliens *per medietatem,* Ch. Molloy, *De Jure Maritimo et Navali,* 1744, p. 448 *et seq.*

[9] See further the present writer's *The Most-Favoured-Nation Standard in British State Practice* (22 *B.Y.I.L.,* 1945, p. 96 *et seq.*).

[10] Lord Granville to Mr. Mayard (Madrid), March 8, 1872 (*Parliamentary Papers 1872,* LXX, 715 [C. 502], No. 2, p. 4). The position of the Executive regarding the expulsion of aliens has since been strengthened on the basis of statutory enactments.

(2) *Toleration.* British Foreign Secretaries who are willing to take up cases of religious intolerance and persecution abroad are fortified in their humanitarian efforts by a tradition which dates back even farther in the British colonial empire than at home. Thus, in a dispatch to Sir Stratford Canning, Lord Aberdeen referred to the 'justice and to the favour with which the vast body of Mahomedans subject to the British rule are treated in India, in support of their demand that all persons, subjects of the Porte and professing Christianity, shall be exempt from cruel and arbitrary persecution on account of their religion, and shall not be made the victims of a barbarous law, which it may be sought to enforce for their destruction'.[11]

(3) *Reception of Refugees.* The treatment of Gentili, a Protestant refugee from Italy, in Elizabethan England, where he became Regius Professor of Civil Law in Oxford and a famous practitioner in the civil law and law of nations, is symbolic of the proud record of this country in its attitude to refugees from religious and political oppression abroad.[12] On many occasions, the British Navy has fulfilled the self-imposed duties which are set out in a letter from the Foreign Office to the Admiralty: 'A British man-of-war has always and everywhere been considered a safe place of refuge for persons of whatever country or party who have sought shelter under the British flag from persecution on account of their political conduct or opinions; and this protection has been equally afforded, whether the refugee was

[11] January 16, 1844 (32 *British and Foreign State Papers,* pp. 915–916). The dispatch dealt with cases in which former Mohammedans who had become converts to Christianity were on this ground condemned to death and executed. This 'barbarous practice' was considered by Lord Aberdeen as an abuse of sovereignty which justified the intervention of any Christian government in the interest of such Christian subjects of the Porte: 'Her Majesty's Government require the Porte to abandon, once for all, so revolting a principle. They have no wish to humble the Porte by imposing upon it an unreasonable obligation; but as a Christian Government, the protection of those who profess a common belief with themselves, from persecution and oppression, on that account alone, by their Mahomedan rulers, is a paramount duty with them, and one from which they cannot recede'. (*Ibid.*, p. 916.)

[12] On the more recent State practice of Great Britain see the Geneva Convention concerning the Status of Refugees coming from Germany, February 10, 1938 (League Doc. C. 75, M. 30, 1938, XII) and the Agreement on the Adoption of a Travel Document for Refugees, October 15, 1946 (Cmd. 7033 [1947]). Cf. also J. H. Simpson, *The Refugee Problem,* 1937 and R. Y. Jennings, *Some International Aspects of the Refugee Question* (20 *B.Y.I.L.*, 1939, p. 98 *et seq.*).

escaping from the arbitrary acts of a monarchical government or from the lawless violence of a Revolutionary Committee '.[13]

(4) *Colonial Trusteeship.* Long before President Theodore Roosevelt, during the Conference of Algeciras, tentatively raised the possibility of an international mandate for Morocco, Locke's conception of government as a trust was applied by British statesmen to the administration of British colonial possessions. A line may be traced from Burke's speech on December 1, 1783 on Fox's India Bill *via* the work of the Select Committee of the House of Commons, appointed in 1835 on the pressure of the Aborigines' Protection Society, to the present position.[14] Though acts such as the granting of Dominion status to India and Pakistan or the recent Agreement on the Independence of Burma speak for themselves, it may not be superfluous to elaborate the principles underlying this evolution in the words of an authoritative British spokesman at Geneva: 'The only thing that holds the British Empire together is equality of status and freedom. . . . The British Empire does not conceive of itself in terms of racial solidarity, but in terms of the free association of free people, encouraged to develop their national consciousness within the greater unit, and, above all, bound together by what is the real guarantee for all minorities all over the world—free self-governing institutions '.[15]

(5) *Anti-Slavery Policy.* The most impressive contribution to the protection of human rights made by any single country in modern times is Britain's abolition of slavery and of the slave trade in her colonial empire and the stigmatisation of the slave trade as piracy under British criminal law.[16] Since the days of the first Stuart kings the activities of English chartered companies engaged in the slave trade had been 'sustained by all the power and patronage of the British government, both in legislative

[13] August 4, 1849 (50 *British and Foreign State Papers,* p. 804). See, however, 2 Moore's *Digest of International Law,* 1906, p. 847.

[14] See further *l.c.* in note 2 above, 1941, Chaps. 6 and 22.

[15] Mr. Ormsby-Gore in the 14th Assembly of the League of Nations (*Official Journal,* Spec. Suppl. No. 120, p. 35). Cf. also E. H. Carr, *Britain,* 1939, p. 37 *et seq.,* and H. Lauterpacht, *l.c.* in note 2 above, pp. 147–150.

[16] Cf. Th. Clarkson, *The History of the Abolition of the African Slave Trade by the British Parliament,* 2 vols., 1808 and the Act of 1824 to amend and consolidate the Laws relating to the Abolition of the Slave Trade (5 Geo. 4, c. 113).

measures and diplomatic acts',[17] and in the *Assiento* of 1713 with Spain it is expressly stated how 'desirous of coming into this commerce' with the Spanish colonies was the Britain of Queen Anne's days.[18] As a result of this treaty the monopoly of the slave trade to the Spanish colonial empire was transferred from French to British merchants, and by 1770 more than half of the hundred thousand slaves annually exported from Western Africa were transported in British ships. In the face of all the formidable vested interests which were arrayed against the reformers, public opinion gradually forced reluctant Parliaments into action and secured the 'establishment of a Magna Charta for Africa in Britain'.[19] There could be no more telling tribute to the British example in setting her own house in order than is to be found in a contemporary Spanish State paper, in which the Council of the Indies recommended in vain to the King of Spain the immediate abolition of the slave trade: 'Twenty years of important and luminous discussions, in the Parliament of Great Britain, have exhausted every variety of argument; and England, which, in a less enlightened Age, had been amongst the most forward in engaging in a commerce against nature, merely because it encouraged the cupidity and avarice of her merchants, has the glory of having been the first likewise, of all the civilised Nations of Europe, in promoting and sanctioning its entire abolition. Justice thereby triumphed. The lamentations of the African slaves, this wretched portion of the human species, were listened to and insulted humanity reasserted its rights. The name of the illustrious William Pitt, the first mover of those discussions, and that of the pious and indefatigable Wilberforce, the author of the Abolition Bill, will be for ever respected by all who feel and can appreciate the high dignity of man'.[20]

[17] H. Wheaton, *History of the Law of Nations,* 1845, p. 586.

[18] E. O'Bryan, *The Compleat History of the Treaty of Utrecht,* Vol. 1, Part 2, 1715, p. 155. Cf. also G. Scelle, *La Traite Négrière aux Indes de Castille,* 2 vols., 1906.

[19] Clarkson, *l.c.* in note 17 above, Vol. 2, p. 580. Cf. also Sir Reginald Coupland, *Wilberforce,* 1923 and *The British Anti-Slavery Movement,* 1933. For a critical survey of British anti-slavery policy, see H. Wheaton, *Enquiry into the Validity of the British Claim to a Right of Visitation and Search of American Vessels suspected to be engaged in the African Slave Trade,* 1842.

[20] Report of February 16, 1816 (4 *British and Foreign State Papers,* p. 517).

III. THE BRITISH WAY

Traditional international law offers plenty of scope for the protection of human rights. Yet powers must be prepared to use their discretion with this end in view and make use for this purpose of the rights which accrue to them against other States under international law.

1. *Recognition.* British State practice in granting recognition to new States and governments and in maintaining or breaking diplomatic relations with foreign powers offers instructive evidence of how the discretion granted in matters of recognition to subjects of international law may be exercised in the interest of the effective protection of human rights.

Frequently, the recognition by Britain of new States was made dependent on the latter granting freedom of commerce [21] to British nationals and of religious liberty [22] or on the conclusion of treaties for the abolition of the slave trade. Thus Palmerston informed the representative of Texas who had come to London in order to obtain the recognition of Texas that Great Britain 'would not be willing to conclude a Treaty of acknowledgment with any new State possessing a naval flag, unless such State were to consent to conclude at the same time with Great Britain a Treaty for the suppression of the African Slave Trade'.[23]

It would be an oversimplification of British State practice regarding the recognition of new governments—especially of new governments brought into power by revolution—to maintain that, at any time, more was required than effectiveness and

[21] Cf., for instance, Canning to Sir W. à Court (Madrid), January 30, 1824 (11 *British and Foreign State Papers,* p. 61). See on this dispatch also H. Lauterpacht, *Recognition in International Law,* 1947, pp. 13–14, and further the Memorandum of a Conference between the Prince de Polignac (France) and Canning, held on October 9, 1823 (11 *British and Foreign State Papers,* p. 50) and the Treaty between the Argentine Confederation and Great Britain of February 2, 1825 (3 Hertslet's *Commercial Treaties,* p. 44). To choose a more recent instance, *de jure* recognition of Lithuania was made dependent by the Conference of Ambassadors on the acceptance by Lithuania of the provisions of the Peace Treaty of Versailles of 1919 regarding freedom of navigation on the Niemen (1 Hackworth's *Digest of International Law,* 1940, pp. 201–202).

[22] See, for instance, the modalities accompanying the recognition of Serbia and Rumania by the Powers represented at the Congress of Berlin (*Parliamentary Papers,* 1878, LXXXIII, 391 [C. 2083], Enclosures in No. 20, pp. 106–107 and in No. 26, p. 144).

[23] Palmerston to General Hamilton (Texas), October 18, 1840 (29 *British and Foreign State Papers,* p. 617).

willingness to fulfil their international obligations.[24] There are, however, frequent instances in which such stability was seen to consist in the subsequent legitimation of the government by more or less convincing evidence of popular support,[25] and others in which 'free elections'[26] were required as an indication of the independence of governments from outside domination. In some of these cases, insistence on support of governments by the greater part of the population may have had the indirect effect of strengthening the cause of political freedom in countries with weak—or without—democratic tradition. Recent developments, however, in most of the countries in Eastern Europe have proved that even compliance with stipulations of this kind at the time of recognition offers no real guarantee against subsequent changes in favour of authoritarian or totalitarian governments.

The recognition of a government is granted on the assumption that it will fulfil its obligations under international law. A dispatch from Lord Russell to the British representative in Mexico may serve as an illustration of the way British State practice linked recognition with the protection of legitimate individual interests. In it Lord Russell explained that instructions issued, both before and since the victory of the Liberal Party in Mexico, 'made the recognition by Great Britain of the Constitutional Government contingent upon the acknowledgment by that Government of the liability of Mexico for the claims of British subjects, who, either in their persons or in their property, for a long series of years, can be proved to have suffered wrong at the hands of successive Governments in Mexico'.[27]

Finally, at least a reference may be made to the not infrequent instances in which Great Britain threatened to break off

[24] Palmerston to Bloomfield (St. Petersburgh), March 28, 1848: 'The Government of Great Britain is in the habit of acknowledging any government established in a foreign State when such government shall appear to be firmly and permanently established'. (*L.c.* in note 7 above, p. 159.) See further H. A. Smith, *Great Britain and the Law of Nations,* Vol. 1, 1932, p. 106 *et seq.*

[25] See, for instance, Lord Derby's speech on Spain in the House of Lords on March 8, 1875 (*Hansard,* 3rd series, Vol. 222, Col. 1382).

[26] Protocol of the Proceedings of the Crimea Conference, February 11, 1945 (Cmd. 7088 [1947], p. 4).

In the case of Finland, Great Britain considered in 1918 the holding of elections as proof of Finland's independence and held out hopes that recognition would follow such elections (*Foreign Relations,* 1918 [Russia], Vol. 2, p. 739 *et seq.*).

[27] March 30, 1861 (52 *British and Foreign State Papers,* p. 237).

diplomatic relations or had to have recourse to this measure in order to induce foreign powers to show greater respect to the rights of British nationals [28] or even of their own subjects. Thus, the Earl of Clarendon informed the Government of the Two Sicilies in 1856 that Britain was not in a position to maintain diplomatic relations with a government which maintained as inhumane a regime as that practised in Naples and which was determined to persevere in a course condemned by all civilised nations.[29] In words which have not lost their significance by the passing of time, Lord Russell expressed himself in another dispatch on the subject of the police State: 'You will press strongly on the Principal Minister of the Crown the necessity of abolishing, as soon as possible, the despotism of the police. Men may differ about the merits of Representative Constitutions, and the form and time in which they should be put in force; but there can be no difference of opinion among enlightened men about the necessity of a due, impartial, and speedy administration of justice. To keep men in prison without trial; to place them under zealous and suspicious police, thus embarrassing all their actions—even the most innocent—is contrary to every principle of justice. . . . It was the open, systematic, and continued violation of justice which induced Her Majesty's Government to suspend friendly relations with Naples'.[30]

2. *Treaties.* Peace treaties and commercial treaties provide a vast mine of information on the ways how England, since the twelfth century, secured fair treatment for her subjects abroad.

Since the Treaty of 1154 with Cologne, it has been one of the set purposes of English—and, subsequently, British—treaty practice to obtain freedom of commerce on a basis of mutuality

[28] See, for instance, the dispatch from the Earl of Malmesbury to Sir H. Bulwer (Florence), May 29, 1852 (42 *ibid.*, p. 531).

[29] Dispatch from the Earl of Clarendon to G. G. Petrie (Naples), October 10, 1856 (46 *ibid.*, p. 773).

On the rupture of diplomatic relations with Serbia, following the murder of the King and Queen of Serbia in 1903, see *British Documents on the Origins of the World War, 1898–1914*, Vol. 4, p. 124 *et seq.*, and Smith, *l.c.* in note 24 above, p. 229 *et seq.*

[30] Lord Russell to the Hon. H. Elliott (Naples), July 6, 1859 (51 *British and Foreign State Papers*, pp. 1336–1337).

It was made clear in the same dispatch that Britain did not intend to interfere with the internal affairs of The Two Sicilies, but merely wished to make clear the indispensable conditions on which British 'moral' and 'material' support to the reigning dynasty depended (*ibid.*, p. 1339).

and reciprocity. At a time when there were not yet generally recognised minimum standards of international law regarding the treatment of foreigners, English draftsmen performed pioneer work in the formulation of treaty clauses by which reprisals against individual traders were reduced within reasonable limits, the personal and property rights of foreign merchants were liberally defined, and their rights of free movement and of free access to the local law courts were established beyond doubt. By way of ancillary rights, even freedom of conscience and of religion was obtained in countries in which, otherwise, the granting of freedom of commerce would have been merely of nominal value.[31] In addition, England took the lead in the elaboration of other standards of international economic law, amongst which those of most-favoured-nation and national treatment are the most important. These treaties were concluded in the interest of her own nationals. Their effect, however, was of a more general character. A good many of the minimum standards fixed in these treaties grew into rules of international customary law and thus became available to the other subjects of international law.[32] In addition, other States increasingly participated in the nexus of most-favoured-nation treaties and automatically partook of the rights which Britain secured for her own subjects.[33]

Seen in historical perspective, British State practice in this field built on the rudimentary foundations of international customary law an elaborate superstructure of treaties in which the rights of individuals abroad were firmly and liberally established. It was not only the ' public law of Europe ' which was enriched in this way. Britain's wide oversea interests enabled her to spread the canons of Western civilisation all over the world. Near and Far Eastern communities which remained independent had to accept the minimum conditions without which relations on a footing of equality were hardly feasible. If

[31] See, for instance, Article 14 of the Treaty of Peace and Alliance between the Commonwealth and Portugal, July 10, 1654: ' Forasmuch as the Rights of Commerce and Peace would be null and void, if the People of the Republick of England should be disturbed for Conscience sake, while they pass to and from the Kingdoms and Dominions of the said King of Portugal, or reside there for the sake of exchanging their wares ', . . . therefore, within the limits of the Article, freedom of religion was granted to the English merchants.

[32] See below under (3).

[33] See further *l.c.* in note 9 above.

their structure and habits were separated by too wide a gulf from those of European States, during a transitory period, exterritoriality treaties provided the means of peaceful symbiosis.[34] African kingdoms had to learn that friendly terms with Britain were only to be had if they abandoned uncivilised habits of warfare amongst themselves and barbarous rites resulting in the slaughter of innocent men and women at the feasts and funerals of tribal chiefs.[35] The newly-established republics of South and Central America were induced by commercial treaties to accept minimum requirements of effective State organisation and fair administration of justice without which it was vain for them to expect the flow to their countries of British capital and skilled labour.[36] Thus British treaty practice throughout the centuries became an effective means of, and remains a telling witness to, the civilising mission which the British Empire performed in most of the independent States bordering on—or near to—the seven seas.

It is not possible within the compass of this paper to pay more than passing attention to the many multilateral treaties in the humanitarian field which were initiated by the British Empire or in which it participated.[37] Two types of bilateral treaties, however, must be mentioned expressly. The Treaty in favour of the Waldenses of 1690 between England, the United Provinces of the Netherlands and Savoy is a hall-mark in the international protection of minorities.[38] Equally, the Anglo-Chinese Treaty of Peace, Friendship and Commerce of 1858 is memorable, as it embodies the first international arrangement on questions of labour.[39]

3. *International Customary Law.* By the middle of the nineteenth century, standards regarding the treatment of individuals which were considered to be normal in Western

[34] See, for instance, G. W. Keeton, *The Development of Exterritoriality in China*, 2 vols., 1928.

[35] Cf., for instance, Article 18 of the Treaty with the Chiefs of the Timmanees, February 13, 1841 (40 *British and Foreign State Papers*, p. 894).

[36] See, for instance, the Treaty of Friendship, Commerce, and Navigation between Colombia and the United Kingdom, February 16, 1866 (Foreign Office, *Handbook of Commercial Treaties*, 1931, p. 118 *et seq.*).

[37] See the list of conventions enumerated in the present writer's *Manual of International Law*, 1947, p. 243.

[38] 18 *British and Foreign State Papers*, p. 670.

[39] Article 13 (11 Hertslet's *Commercial Treaties*, p. 86).

countries were taken for granted so generally and in such a matter of fact way that British State practice increasingly tended to claim their observance as due to British nationals under international customary law or as general principles of law recognised by civilised nations. Thus in 1872 the consuls in Bucharest of Austria-Hungary, France, Germany, Great Britain, Greece, Italy and the United States of America sent a collective note to the Government of the Principalities of Moldavia and Wallachia in which it was maintained that ' a civilised country . . . as such, ought to ensure freedom and security to all religious denominations '.[40]

British State practice has always been especially sensitive to any form of ill-treatment of British nationals abroad. It was immaterial whether the British national involved was of rank and title or of the humblest station in life. In the words of Palmerston in a case of traffic in British slaves in the West India possessions of foreign Powers, ' it is impossible for Great Britain to permit British subjects, whatever their colour may be, to be kidnapped into a foreign country, and there to be held in slavery '.[41] Equally instructive is a Note of Bulwer to the Spanish Foreign Minister: ' You are at liberty to do what you will with any Englishman who disturbs the public tranquillity; but I must at the same time warn you that I shall hold the Spanish Government responsible, not only for any murder but for any injury as well as for any insult committed without provocation upon any subject of Her Majesty '.[42] Another British envoy to Spain reflected on the same subject in the course of the Second World War: ' On this point Spaniards who think it worth while to study the English, will note that while it is impossible to make them prepare for war, and difficult to make them fight, there was once a " War of Jenkin's Ear ".[43] Maltreatment of British subjects, however humble, is one of the

[40] C. Adler and A. M. Margalith, *With Firmness in the Right. American Diplomatic Action affecting Jews 1840–1945*, 1946, p. 106.

[41] Viscount Palmerston to Mr. Villiers (Madrid), December 12, 1835 (24 *British and Foreign State Papers*, p. 188).

[42] 38 *ibid.*, p. 940.

[43] When Captain Jenkins was examined at the Bar of the House of Commons and asked by a member what he thought when he found himself in the hands of the barbarians who had cut off one of his ears, he replied: ' I recommended my soul to God and my cause to my country '. (T. Smollett, *The History of England from the Revolution of 1688*, Vol. 6, 1811, Note D to Vol. 3.)

things the British people will never forgive and never forget'.[44]

If subordinate State organs are responsible for any such outrage, it is for the offending State to make full reparation.[45] In the case of crimes committed by individuals, speedy and impartial administration of justice must be expected.[46] British State practice has been firm on compliance with these minimum standards. Yet at the same time, diplomatic protection has been judiciously exercised and British Foreign Secretaries kept in mind the advice tendered in 1858 in an opinion of a law officer of the Crown: 'Great Britain can put forward no claim, and can make no demand in this case, which she is not prepared to concede to Naples or to any other recognised Government, however weak or barbarous'.[47]

On numerous occasions Britain extended a helping hand to non-British nationals on broad humanitarian grounds. In the course of the Civil War in The Two Sicilies in 1848 Lord Napier suggested to the Neapolitan Foreign Minister a truce and negotiations with the revolutionary government at Palermo under the concerted mediation of France and Great Britain in order to make an end to the cruelties and devastations caused by that war. This course of action was fully approved by Palmerston.[48] British envoys were equally encouraged to maintain unofficial contacts with revolutionary forces and to remind them of the rules of warfare in civilised countries.[49] In these cases Great Britain limited herself to offering advice to governments which considered themselves to be entitled to particular support from Britain or, in the case of revolutionary governments, hoped to obtain recognition by Great Britain. Such special relations appeared to justify to British statesmen advice which might

[44] Viscount Templewood, *Ambassador on Special Mission*, 1946, p. 201. See further *ibid.*, on the case of Mr. Apfel who had to suffer two years' imprisonment in 'mediaeval conditions'.

[45] See, for instance, the case of the assault by a Brazilian police guard on three officers of H.M.S. *Forte* (1862–54 *British and Foreign State Papers*, p. 691).

[46] See, for instance, the case of the plunder of the wreck of H.M.S. *Prince of Wales on the coast of Brazil* (1861—*ibid.*, pp. 589–590 and 685).

[47] Opinion of the Advocate and Solicitor-General to Malmesbury in the case of the *Gagliari*, April 13, 1858 (48 *ibid.*, p. 468).

[48] Palmerston to Lord Napier, September 22, 1848 (40 *ibid.*, p. 824). See also the Queen's Speech on the Opening of Parliament, February 1, 1849 (37 *ibid.*, p. 1.)

[49] See, for instance, Palmerston to Consul-General C. G. Dawkins (Venice), April 5, 1848 (37 *ibid.*, p. 964).

otherwise have been regarded as a ' questionable act of propriety and interference ',[50] and they simultaneously volunteered offers that, in corresponding circumstances, they would be obliged for reciprocal intervention.[51]

It is possible to refer here only *en passant* to the numerous cases in which British embassies, legations and men-of-war offered shelter to men marked down by their political opponents. Justification for these acts is not primarily to be sought on narrow legal grounds but on the grounds of common humanity and decency and in a healthy British reaction to the departure by others from such standards.[52]

It would equally surpass the scope of this paper to give a detailed exposition of the cases of humanitarian intervention in which this country participated. More of these instances than is generally assumed find their legal basis in treaties and unilateral engagements undertaken by powers against which, in the interests of humanity, intervention was subsequently considered necessary. There remains, however, a residue of cases in which the title to intervention is simply the abuse of sovereignty on the part of foreign powers.[53]

CONCLUSIONS

The remarkable results obtained by British State practice in the international protection of human rights are due to a variety of circumstances. The example set to the world in the treatment of the individual within the British Empire will always rank as the first and foremost point to be stressed. It provides the moral justification for actions which sometimes stretched existing international law in the service of Christianity, humanity and civilisation. British statesmen felt justified to act in this spirit as, in the period of Britain's greatest strength, they conceived international law not as a static code, but as a living and expanding system. Yet they also knew their limits. In a world of sovereign

[50] H. L. Bulwer to the Spanish Foreign Minister, April 16, 1848 (38 *ibid.*, p. 962).

[51] See, for instance, Palmerston to Bulwer, April 20, 1848 (*ibid.*, pp. 954–955).

[52] See, for instance, Palmerston's Note to the Spanish Minister in London of June 12, 1848 (38 *ibid.*, pp. 1047–1048).

[53] See, for instance, the Protocol of the London Conference on the Greek Question, February 20, 1830 (17 *ibid.*, p. 203) or the dispatch from the Earl of Aberdeen to Sir Stratford Canning (Constantinople), October 4, 1843 (32 *ibid.*, p. 905).

States they thought of themselves as standard-bearers of civilisation and human progress, but they did not pretend to exercise influence beyond the reach of British naval and economic power. Even within those limits they exercised their rights judiciously and did not overplay their hand by embracing indiscriminately the cases of British nationals who requested the interposition of the Foreign Office. At times this policy had to be firmly upheld against powerful pressure groups at home: 'Her Majesty's Government have, on every occasion, supported such portions of the complaints preferred by British subjects against sovereign governments, as to them seemed founded in reason and justice', but 'it is for Her Majesty's Government, and not for individuals, however respectable, to interpret the Treaty engagements of the Crown,[54] and to determine whether Great Britain is, or is not, entitled to claim redress from foreign governments'.[55]

A steady practice based on these principles has led to a protection of basic human rights on a scale which appears today highly enviable. It is, therefore, surprising that so much attention should be paid now to schemes for international bills of human rights which appear to be rather out of touch with reality. Everywhere the State encroaches—to an extent considered inconceivable a few decades ago—upon the freedom of the individual. More than ever before in modern times is the individual helpless unless organised in powerful and militant groups. The world is today divided more strongly along ideological lines than at any time since the French Revolution. Even a cursory perusal of the recent United Kingdom Draft of an International Bill of Human Rights [56] will show how differently such clauses are bound to be interpreted in the democratic, authoritarian and totalitarian States which are invited to become parties to this Bill. If there is anything reassuring in this Draft it is the admission that it 'has not been submitted, at this stage, to the highest legal authorities in the United Kingdom'.[57]

Charters of human rights are a perfectly legitimate—though rather overrated—form of protection of human rights within

[54] Reference is made here to the Anglo-Dutch Treaty of 1824.
[55] Viscount Leveson to the Glasgow East India Association, May 27, 1841 (31 *ibid.*, p. 257).
[56] *L.c.* in note 1 above.
[57] *Ibid.*, p. 4.

closely knit and highly integrated communities.[58] Within the framework of as weak a confederation as the United Nations, provisions of this kind are at the best ineffective. By their very ineffectiveness, however, they do harm to the cause of international law. At the worst, such bills project on to the international scale ideological cleavages which sharply divide the world and, in this way, their sponsors gratuitously add to the dissensions inherent in any system of power politics. They provide specious arguments for mutual intervention and recrimination, and whatever such schemes may achieve in the present state of the evolution of international affairs they are unlikely to further the cause which they purport to serve.[59]

The reassertion of human rights in the Charters of the Nuremberg and Tokyo Tribunals and in the Peace Treaties of 1947 with Germany's satellites may be justified on the ground that the barbarian challenge to international law and civilisation by the totalitarian aggressors called for equally exceptional remedies.[60] Yet hardly was the ink dry on the signatures to the Peace Treaties of 1947 than the British and United States' Governments had to protest against a 'denial to a large section of the Bulgarian people of their democratic rights'[61] and against a mock trial which amounted to a 'travesty of justice' and to 'judicial murder'.[62] It appears, however, that such notes to governments beyond the effective reach of the Western Powers are necessarily of a rather platonic character. The police-States of Eastern Europe are merely the outposts of another member of the United Nations which, too, is a party to these Peace Treaties and which—in accordance with the afterthoughts of the San Francisco Conference—is pledged to promote and encourage 'respect for human rights and for fundamental freedoms for all'.[63]

These recent happenings can only underline the lesson to be

[58] See *Power Politics, l.c.* in note 2 above.
[59] See further 1 *Year Book of World Affairs,* pp. 320–322.
[60] See further the present writer's *Judgment of Nuremberg* (21 *Tulane Law Review,* 1947, p. 351 *et seq.*).
[61] Note from the British Political Representative in Bulgaria to the Bulgarian Minister for Foreign Affairs, September 11, 1947.
[62] Note from the British Minister to Bulgaria to the Bulgarian Government, September 25, 1947.
[63] For a full treatment of the position under the Charter of the United Nations, see R. Brunet, *La Guarantie Internationale des Droits de l'Homme d'après la Charte de San Francisco,* 1947, p. 127 *et seq.*

drawn from British State practice in this field—both from its successes and its failures: Britain attained 'her precedence of teaching nations how to live' [64] by progressing empirically and experimentally in a spirit of healthy scepticism towards 'abstract and speculative principles'.[65]

[64] John Milton, *The Doctrine and Discipline of Divorce* (3 *Prose Works* [ed. J. A. St. John], p. 178).

[65] 2 *Cambridge History of British Foreign Policy*, 1923, p. 632.

The problem has been put in a nutshell in a recent leading article in *The Times* (December 1, 1947): 'No advantage can be gained by glossing over differences in the desire to discover here and now a set of formulas vague enough and innocuous enough to obtain universal assent'.

II

THE DEVELOPMENT AND REFORM OF CHINESE LAW

His Excellency Tien-Hsi Cheng

That the history of what the law has been is necessary to the knowledge of what the law is really requires no authority for its affirmation; but if any authority is needed, I may just refer to Oliver Wendell Holmes. In this lecture, particularly, since it deals with the law reform of China, a historical sketch of the old law of China is indispensable. But such a sketch can only be a very incomplete one; because it is obviously impossible, within the scope of a single lecture, to deal more than in fragments with the past law of a country having a history of more than forty centuries and a population of more than four hundred millions. I will, therefore, in this respect confine myself only to those aspects of the law that are essentially Chinese, and possess, or appear to possess, a special juridical interest, excluding at the same time what is called 'Public Law' in the Austinian sense of the term.

To begin with, it may be stated that in the development of her civilisation and institutions China all along, until comparatively recently, followed her own ways and her own ideas. She had her own religion, her own philosophy, her own system of government, her own literature, her own art, and her own law. There is no counterpart in the history of ancient China that recalls that of the compilation of the Twelve Tables in ancient Rome. But though ancient China produced her law entirely from her own soil, she was more fertile in the field of philosophy and ethics than in that of jurisprudence. Her ancient jurists or legists, known as Fah Chia, the most distinguished of whom was named Han Fei, born in the third century B.C., expounded law as a subject of political philosophy rather than juridical science, by advocating government by law sternly enforced as opposed to government by ethics through men deemed to be worthy. For instance, he would teach: 'No State

can be always strong or always weak: those which are strong in the enforcement of law will be strong; those which are weak in the enforcement of law will be weak'. Again, 'Rewards that are excessive spoil the people; punishments that are excessive cease to be deterrent'. And, 'An enlightened ruler does not give secret rewards, or take upon himself to remit punishments or pardon crimes'. A later exponent of that school of philosophy when asked, 'Suppose the law is bad, what will happen?' his answer was, 'Bad law is better than no law, because it establishes uniformity. If you divide money or cattle by drawing lots, it does not mean that such drawing makes a fair division, but disputes may thus be avoided'.

There is no place here to discuss the philosophy of this school; but it may be said that the Chinese, especially in their private lives, have always been predominantly governed by ethics rather than by law. By ethics are largely meant the teachings of Confucius, as embodied in the Classics, which in the old days formed exclusively the textbooks in schools and colleges. Regarded as the fundamental rules of human conduct, these teachings have been accepted as the moral standard for the last two thousand years. Indeed they were often quoted in official documents and evoked in the interpretation of laws. In the words of Professor Giles, a well-known English sinologue, 'The Confucian teachings are of the very highest order of morality and have moulded the Chinese people for so many centuries, helping perhaps to give them a cohesion and stability remarkable among the nations of the world'.[1]

In this connection it may be mentioned that as early as 200 B.C. a code of private conduct, based on Confucian teachings, was compiled under the name *Book of Li,* sometimes translated as *Book of Rites,* the rules prescribed by which, though not having the force of law because breaches of them are not sanctioned by punishment but only expose the offender to public criticism, are somewhat regarded as even superior to law, because of their higher standard in ethics. This moral code, because of its higher standard in ethics, applies to the educated rather than the common people; for in China the doctrine *noblesse oblige* (in Chinese called 'A higher standard of conduct is expected from the worthy') has been in vogue from time

[1] Giles, *Civilisation of China,* p. 116.

immemorial, and the common people, therefore, are not expected to conform to it, though, of course, an uneducated man who nevertheless conforms to it would raise himself higher in the esteem of his fellow men. This has sometimes led people unfamiliar with Chinese institutions to think erroneously that in old China there were two forms of law—one applicable to a so-called privileged class, another to a non-privileged class. There was nothing of that kind, inasmuch as there was never any class distinction in China and still less any privileged class. What actually happened was that, while everybody must conform to the law, a higher standard of conduct than what was prescribed by the law was expected from the educated man. This rule still prevails.

Before the modern courts were introduced some forty years ago, civil disputes, at any rate the simpler ones, were mostly settled in the village chapel, which may be likened to a full family council, or in the temple, which may be compared with a town hall, or in the guild, which is equivalent to a chamber of commerce. In these customary institutions, which may be termed 'Courts of Equity', law in the strict sense of the term hardly came into play, but customs and ethical principles prevailed. Customs may vary with the district in which the dispute has arisen, but the ethical principles applied are the same; for there is only one written language, and the teachings of the ancient sages taught in schools throughout the whole of China are the same.

It may be asked why civil disputes were settled generally in these institutions and not in a court of law. The explanation is simple. There were in those days no law colleges as there are now, where one might learn law, while the Confucian Classics formed almost the only textbooks used in schools. Generally speaking, therefore, the law was not only unknown to the people but might even have seemed to them a mystery; for, to use the words of the poet, '*Law* to their eyes her ample page did ne'er unroll', whereas the ethical teachings of Confucius, or at least some of them, were familiar to every one who had been to school. For that reason one instinctively preferred a 'Court of Equity' to a court of law. Moreover, such a 'Court of Equity', apart from the fact that it was more accessible to them than a court of law, would always be composed of people on the spot, who

probably knew the parties personally and even had some idea of both sides of the case. The parties in dispute would also feel more at home in such surroundings, as though their case was being heard by their peers. A settlement in these institutions, moreover, would entail no delay, as there was no cumbersome procedure, no expense (as there were no fees to pay), and generally no bitter feeling, as no judgment was decreed, whereas litigation would have had just the opposite effect.

This preference for a settlement of disputes in a private institution to a decision in a public tribunal is no doubt one of the main causes of the scanty development of the civil law. In the field of penal law, however, legislation was abundant. As early as several centuries B.C. what may be called a penal code for the regulation of punishments was drawn up, which is often said to have laid the foundation of subsequent Chinese criminal law. But no comprehensive code existed until the *Tang* Code was enacted in A.D. 654, which may really be said to have served as the basis of Chinese legislation from the seventh century to the beginning of the twentieth. Its provisions were adopted in part in the successive *Sung* (A.D. 960–1277), *Yuan* (A.D. 1277–1368), and *Ming* (A.D. 1368–1643) dynasties; and the Manchus of the *Tsing* dynasty re-edited it under the title of *Ta Tsing Lu Li*. Several editions of this code were published during the *Tsing* dynasty, and a summary of the edition dated the fourth year of *Kia Ching* (1799) was translated into English by Sir George Staunton in 1810 and into French by Renouard de Sainte-Croix in 1812. An Italian version was also published about the same time. The edition dated 1890 has been extensively translated into French, with commentaries, notes and appendices, by Father Gui Boulais.[2] In 1910, the year before the fall of the *Tsing* dynasty, the last revised edition appeared under the title of *Ta Tsing Hsin Hsing Hsing-lu*, which means 'The Penal Law in Force of the Great *Tsing* Dynasty'.

Though the code was termed 'penal' and it was so in character, it was in fact the *Corpus Juris* of China. Apart from penal law in the strict sense of the term, it also comprised administration, finance, public works, the army, the family, and civil obligations. As stated in the Introduction of the Civil Code, 'It is quite characteristic of the old traditional conception of

[2] See *Introduction to the Chinese Civil Code*, English version, p. 9.

Chinese Civil Law that it is not so much to regulate private intercourse between individuals and to delimit their respective rights as to preserve the general harmony of the universe. More emphasis is laid in the *Ta Tsing Lu Li* on the duties of the people based on ethical principles than on their claims. Every violation of a legal rule, although it might injure a private interest and involve no criminal responsibility in the modern sense of the word, constitutes in this system a breach of the order of the world, the safeguard of which has been entrusted by Heaven to the Emperor, and therefore involves for its author not only civil consequences, such as compensation for the damage caused, but a penalty for transgression of an ethical precept'.[3]

Notwithstanding the ancient character of the code it must not be supposed that it contains any provisions like those of the Roman Twelve Tables, which allowed the creditors to cut up the body of the insolvent debtor. This severity of the Twelve Tables has at no time had any counterpart in Chinese law. In fact, for more than twenty centuries it has been a maxim for the Bench that 'when a judge has found out the truth of an accusation, he should be grieved and compassionate for the accused rather than jubilant over their success in the finding'. The underlying meaning of this maxim is that the existence of crimes is laid primarily at the door of those who govern, just as, according to Whichcote, 'the execution of malefactors is no more to the credit of rulers than the death of patients is to the credit of physicians'. Whichcote's words have been called by Professor Kenny 'an overstatement'; because as the latter says, 'Whereas the death of one patient never constitutes any step towards the cure of others the execution of a man, whom the fear of punishment has not deterred from murder, may help nevertheless to deter others'. In my opinion Professor Kenny's comment is correct from the standpoint of deterrence, but Whichcote's observation is no exaggeration from the standpoint of government; for a ruler cannot escape responsibility for the existence of crimes within his dominion. At least, their existence is no credit to him. Coming back to the code, in order to give an idea of its provisions, I can do no better than quote the words of its translator, Sir George Staunton, in his Introduction to the translation, as follows:—

[3] *Civil Code*, p. 10.

'By far the most remarkable thing in this Code is its great reasonableness, clearness and consistency, the business-like brevity and directness of the various provisions, and the plainness and moderation in which they are expressed. There is nothing here of the monstrous verbiage of most other Asiatic productions, none of the superstitious deliberation, the miserable incoherence . . . but a calm, concise and distinct series of enactments, savouring throughout of practical judgment and European good sense and, if not always conformable to our improved notions of expediency, in general approaching to them more nearly than the codes of most other nations . . . for the repression of disorder and the gentle coercion of a vast population it is equally mild and efficacious'.[4]

This mild character of the code is, in my opinion, no doubt due to the maxim, immemorially and universally observed, that 'the law should be severe but its execution lenient', which in Chinese is called *Li Fah Yen Hsing Far Su*. As Sir George Staunton has observed, 'although every page may seem at first sight to bear testimony to the universality of corporal punishment in China, a more careful inspection will lead to a discovery of so many grounds of mitigation that the penal system is found, in fact, almost entirely to abandon that part of its outward and apparent character . . .; another object which seems to have been generally consulted is that of as much as possible combining, in the construction and adaptation of the scale of crimes and punishment throughout the code, the opposite advantages of severity in denunciation and lenity in execution'.[5] Indeed there are a few well-known classical precepts which used to be learned by students by heart from books at school, and which must have had a profound and permanent influence on the Chinese legal or judicial mind. They consist partly of the instructions given by the ancient Emperor Yu (2205–2198 B.C) to his Chief Justice and partly of the answer given by the latter, *viz.* 'Punishment should not be extended to one's descendants; reward should be so extended. Involuntary faults should be pardoned, however great they may be; voluntary faults should be punished, though they may be small. In cases of guilt when there is doubt as to whether a heavier or lighter punishment should be imposed,

[4] *Encyclopædia Sinica*, p. 293.
[5] Translation of *Ta Tsing Lu Li* by Sir George Staunton, p. xxvii.

decide on the latter; in cases of merit when there is doubt as to whether a greater or smaller reward should be given, decide on the former. Rather err in letting off a person who is guilty than err in condemning a person who is innocent. The object of punishment is the negation of the necessity of punishment' (*i.e.* deterrence or prevention rather than retribution). The last precept, namely 'the object of punishment is the negation of the necessity of punishment' differs from Hegel's theory, with which students of law are no doubt familiar, namely 'wrong being the negation of right, punishment is the negation of that negation'; for according to this view punishment is retributive. Whether this view is the right conception of punishment is not a question to be discussed in this lecture, but the fact that, more than two thousand years before the Christian era, Chinese jurists considered that the object of punishment was deterrence and prevention rather than retribution, shows that the Chinese conception of criminal justice has always been humane.

Another precept that has had a similar influence on Chinese legal or judicial thought is one derived from a dialogue between the Sage Mencius (born 372 B.C.) and his disciple, namely, 'Suppose, while Shun was Emperor and Kaou-Yau Chief Justice, the father of the Emperor had committed a murder, what would the Chief Justice have done in that case?' 'The Chief Justice would simply have had him arrested according to the law', replied Mencius. 'But would not the Emperor have forbidden this?' the disciple inquired. 'How could the Emperor have forbidden this? It was just what the Chief Justice had to do according to the law entrusted to him, which even the Emperor could not defy', answered Mencius. This shows that even more than twenty centuries ago the principles of supremacy of the law and judicial independence were clearly recognised.

Having thus given you a glimpse of the general character of the ancient law of China that had existed wholly up to 1911 and partly (namely the civil part) up to 1930, I now come to the period of law reform. First of all let me observe that however workable the old code might have been in the days when steam was not yet discovered, it must have appeared to be ever increasingly out of date after the bridge between East and West had been opened, because of its ancient character, which went back more than ten centuries and also because of its scanty

provisions in civil matters, which did not go beyond marriage, succession and debts. In other words, the scarcity of civil provisions in particular rendered the code incompatible with the needs of a society gradually becoming modern.

Apart from this internal need for reform, a great impetus was given to it by the natural desire of China for the removal of the fetters on her sovereignty in the form of consular jurisdiction conceded to foreigners under treaties made in the latter part of the nineteenth century. This privilege, now abolished, due to China's heroic resistance to aggression in the second World War, enabled foreigners entitled to its protection to be sued only in their national courts and so to put themselves beyond the jurisdiction of the territorial tribunals. It was granted to the nationals of certain treaty Powers in the remote days when there were only a small number of foreigners and five treaty ports, that is five places where foreigners could trade and reside. But as these places had in time increased in number, the foreign population over whom Chinese courts exercised no control had also grown in size, and after this privilege had been exacted by Japan for her subjects after the conclusion of the Sino-Japanese war of 1895, the problem became very serious indeed, for this privilege not merely constituted an infringement of China's sovereign rights but, when enjoyed by a large foreign population, might even undermine her very existence as an independent State.

The Sino-Japanese war, however, brought about an awakening. A general political reform movement was started, but by reason of the obstinacy of the Manchu Empress—a story well known to the world—ended in the persecution of the reformers. Nevertheless, once awakened, China was alive to the impairment of her sovereign rights and determined to remove the fetters. As a consequence the revised commercial Treaty concluded with Great Britain in 1902 contained a provision as follows:—

'China having expressed a strong desire to reform her judicial system and to bring it into accord with that of Western nations . . . Great Britain agrees to give every assistance to such reform, and she will also be prepared to relinquish her extraterritorial rights when she is satisfied that the state of the Chinese laws, the arrangements for their administration and other considerations, warrant her in so doing'. A similar

provision was also made in the commercial treaties concluded a year later with the United States of America and Japan. Since then the reform of her law was no longer the mere outcome of a desire on the part of China to improve her judicial system for its own sake, but also necessary for fulfilling a treaty provision in order to remove a fetter on her sovereignty. This explains why in her law reform China looked mainly to Western jurisprudence for guidance and as a result there is practically no difference in principle between her present law and the law of Western nations. Nor have the Chinese people found the new law strange or unsuitable, because, as I have said, they have for ages been governed largely by ethics, which are in fact of a more exacting character than laws. For instance, in the old law there was no such thing as the extinction of a right, either by prescription or limitation. Nor would an obligation be held unenforceable merely because it was not evidenced in writing, as provided in the English Statute of Frauds. The position of the Chinese heir, too, was unenviable when his father left him nothing but debts; for he had to pay them in full and there was no *beneficium separationis* or *beneficium abstinendi* available to him as there was for the Roman heir under prætorian law.

The perpetual liability of a debtor to pay his debt until it is discharged and the personal liability of the heir to pay his father's debts were no mere *obligatio naturalis,* as understood in Roman law, but a full legal obligation, though this severity of the law was tempered by the provision that, irrespective of the duration of the debt, the interest should in no case exceed the principal.[6] Not only were these obligations legally binding, but the law creating them was in full force up to the promulgation of the Civil Code in 1930. As late as 1916 the Chinese Supreme Court gave the following decision:—

'Our existing law having no provision as regards extinctive prescription, the contention maintained by a debtor that the right of a creditor is barred, if not exercised for a long time, is unfounded'.[7]

As to the liability of a son to pay his father's debts, the principle was affirmed by the Supreme Court in 1914.[8] Indeed,

[6] *Vide* A.C. 3rd year 843.
[7] A.C. 5th year 461.
[8] A.C. 3rd year 9.

when I practised in Shanghai some years ago a client of mine had to go to prison because of his deceased father's debts, and I had to console him by saying that his temporary deprivation of liberty would cast no stain on him but would rather raise him in the esteem of his friends for being the victim of a noble tradition. Of course, these laws have now become a matter of history, since the law of China has been brought into accord with that of Western nations.

With this digression I now resume the subject of law reform. In 1902, soon after the conclusion of the revised commercial treaty with Great Britain, an eminent jurist in Chinese jurisprudence, Mr. Shan Chia Pan, and the well-known lawyer-diplomat, Dr. Wu Ting Fang, who was a member of the English bar, were, on the recommendation of Yuan Shik Kai and a few other high officials, commissioned by the Emperor Kwang Hsu to bring the law into accord with Western jurisprudence. This project met with some opposition, for there were powerful elements in the Government who thought that a radical change in the law that had been observed for centuries would give rise to misgivings among the people, and they suggested therefore a mere modification of the then existing law, at least as a means of preparing the minds of the people for the reception of a new system. In those days when every reform was liable to be regarded with scepticism, counsel of moderation always gained adherents, and as Dr. Wu, one of the High Commissioners appointed by the Emperor, was then in America in a high diplomatic post, his absence, since it necessarily postponed the execution of the project, also lent opportunity to the adoption of the latter suggestion. Dr. Wu's new appointment soon brought him back to China, and he at once began his new task. A general scheme of legal reform was drawn up with the assistance of an American lawyer as adviser. In 1904 a Law Codification Commission was created—an event that may justly be called the commencement of a new era. While the commission was engaged in drawing up new codes, the moderate scheme of modifying the existing law was bearing fruits. At first, all excessive forms of punishment, including torture as a means of obtaining confession, were abolished, and in the revised code sanctioned by the infant Emperor in 1910 over two thousand provisions of the old code were repealed.

The reform thus begun on the new legislation might appear to be only of a negative character. Such a process is, however, not without its merits. 'Every law', says Bentham, 'is an evil, for every law is an infraction of liberty, and that Government has but the choice of evils'.[9] One of our philosophers of the pre-Christian era also has said: 'More laws there are, more offences there will be', which reminds one of the line from Milton, 'So many laws argue so many sins'. It is, therefore, easier to repeal an old law than to introduce a new one; for, apart from the fact that every law has to be introduced with caution, an old law may have become obsolete or proved pernicious long before it is actually abolished. As the Chinese Code at that time was in substance a readaptation of an earlier code dated the eighth century, it is easily conceivable that there was a great need of spade work when modern law reform was begun in China.

But legislation of a positive character was not long delayed. In 1907 what may be called the Judicature Act of China was passed. Consisting originally of 139 Articles, it was the first attempt to put the courts on a systematic basis in line with Western jurisprudence by dividing them into four classes, *viz.* the Local Court, the District Court, the High Court and the Supreme Court, with a Procuratorate of corresponding rank attached to each of them. The Local Court was abolished a few years later. Since then the District Court has become the Court of First Instance, where the trial is by one judge, the High Court has become the Court of First Appeal, where the trial is by three judges, and the Supreme Court, which is now called the Highest Court, has become the Court of Ultimate Appeal, where the trial is, generally, by record before five judges without oral argument and is limited to questions of law.

It would serve no purpose, even it if were possible, to go into this Act in detail; but there are two important provisions that deserve more than a passing notice. One prescribes the qualification of judicial officers, the other confers on the Supreme Court the right to interpret the law. In old China the only avenue open to an official career was through the classical examinations. The best scholar, or rather the best essayist, if successful in his official examination, was considered to be the fittest man for the administration, whether executive, judicial or even military.

[9] *Theory of Legislation.*

This tradition more or less recalls a passage in Carlyle's *Heroes and Hero-worship*: 'I have no notion of any truly great man who is not all sorts of men. Shakespeare one knows not what he could not make in the Supreme degree'. Indeed the man who directed the campaign successfully against the Taiping Rebellion and saved the crumbling Manchu dynasty was a scholar and philosopher, Marquis Tseng, whose eldest son was at one time accredited to the Court of St. James's. There is an interesting story told about him that throws some light on his scholarly and philosophical habit, namely, he always kept up the practice of writing every morning something like a hundred characters in the classical style as a means of conserving his energy and tranquillity of mind. While engaged in this scholarly and philosophic pursuit he would tolerate no interruption. One day, during the siege of Nanking, when he was just half-way through his exercise, a sentinel presented himself, saying, 'Sir, the enemy is at our gate!' To this he, with the spirit of Drake in face of the Armada, replied, 'Say that again when I have finished my writing!'

However, there is really nothing very extraordinary in this tradition, when one remembers that, in the critical days of the first World War, the English Admiralty was headed at one time by a philosopher and at another by a lawyer. There is also much truth in the observation of the man who says, 'If ever I should be put on trial for my life I would choose to be tried rather by a man who knows everything but law than by one who knows only law and nothing else'. It may be enlightening in this connection to quote Professor Giles once more. 'A good deal of ridicule', he says, 'has been heaped of late on the Chinese competitive examinations, the subjects of which were drawn exclusively from the Confucian Canon, and included a knowledge of ancient history, of a comprehensive scheme of morality, initiated by Confucius and elaborated by Mencius (372–289 B.C.), of the ballads and ceremonial rites of three thousand years ago, and of an aptitude of essay-writing and the composition of verse. The whole curriculum may be fitly compared with such an education as was given to William Pitt and others among our own great statesmen'.[10]

In spite of what I have said about the ways in which men

[10] *Civilisation of China*, p. 112.

were chosen for the administration of law in old China, it must not be supposed that the judge was not without what may be called legal assistance. To every office involving judicial functions was attached a man trained in the law, who acted as the legal adviser or assistant to the holder of the office. Such a practice resembles the position of the justices of peace in England who, if I understand rightly, dispose of the largest number of criminal cases in this country. But the old tradition, however workable in the past, obviously could not meet the requirements of a modern society and still less the requirement that the law should be brought into accord with that of Western nations. Hence came the legislation prescribing a minimum qualification for those aspiring to be judges. For example, Article 106 of what I have called the Judicature Act of China provides, 'No person shall be appointed a judge or procurator unless he has passed the two examinations prescribed in the Judicial Examination and Appointment Regulations'; Article 107 provides, 'Any person who has studied three years or more in a college of law or political science and obtained a certificate of graduation may go in for the first examination'; Article 108 provides, 'Graduates successful in the first examination shall serve in a District Court or Procuratorate as probationary or student judges or procurators for two years, after which, and on passing a second examination, they may be appointed puisne judges or procurators of District Courts or Procuratorates'. These provisions have since undergone some changes, but their substance remains. I have gone into these provisions perhaps a little too much in detail. But as the law administrator is just as important as the law itself, a radical change in the system concerning qualification and appointment of judges constitutes in fact a material part of the law reform.

So far I have dealt with only one of the two important provisions I mentioned. Now I come to the other, which conferred on the former Supreme Court the power of interpreting the law. Students of Roman law will remember that one form of imperial legislation in Rome was by *epistolæ* or *rescripta,* consisting of answers to questions of law addressed to the Emperor. The right of interpretation conferred on the Supreme Court and now exercised by the Judicial Yuan, of which the Highest Court forms a part, had the same effect, for before the

promulgation of the Civil Code, when civil laws were scanty, it was common practice that questions of law which, moreover, had to be formulated in the abstract, were referred to the Supreme Court for opinion in the form of interpretation, and the Supreme Court gave its reply by letter, which was as good as law, inasmuch as the Supreme Court was the court of ultimate appeal. It was in this way that a number of legal principles of modern jurisprudence were introduced through the channel of interpretation. The principles thus introduced, together with those enunciated in the various decisions of the Supreme Court, developed a large body of what Bentham calls 'judge-made law', based entirely on Western jurisprudence, which in the space of some twenty years had not only prepared the mind of the people, by degree and in a practical way, for the reception of the new code, but also furnished almost all the essential rules necessary for the regulation of the affairs of a population of more than four hundred millions.

The way in which the Supreme Court assumed the function of indirect legislation was bold and swift. For instance, in one of its earliest decisions [11] it was laid down that 'Civil cases shall be decided according to the provisions of law, in the absence of such provisions, according to customs and, in the absence of customs, according to general principles'. Students of comparative jurisprudence are no doubt aware that Article 1 of the Swiss Code provides: 'Where no provision is applicable, the judge shall decide according to the existing customary law and, in default thereof, according to the rules which he would lay down if he had himself to act as legislator', and that in the Italian Code the judge in such circumstances is referred to the general principles of law. In the light of these it is possible that the principle then enunciated by the Supreme Court owed its source to one of these codes. Anyhow, its adoption cleared the way for the wholesale importation of modern legal principles. Thus it was laid down in a decision of the fourth year of the Republic that 'The exercise of rights and the performance of obligations must be in accordance with the requirements of good faith',[12] a principle which is embodied in Article 242 of the German Civil Code, and in another decision that 'The term "domicile"

[11] Second year of the Republic, [1913] A.C. 64.
[12] Fourth year A.C. 32.

has not yet been defined in our existing law, but according to general principles it should mean " residence in a definite place with intention to live there permanently ", a definition which is entirely in accord with modern ideas'. One may go on enumerating principles like these that have been enunciated by the Supreme Court. Suffice it to say that by the time the Civil Code was promulgated in 1930, the body of legal principles declared in the decisions of the Supreme Court was so comprehensive that it differed little from a modern code.

While the Supreme Court thus played a silent but a material part in law reform by way of indirect legislation, the Law Codification Commission continued to do good work. In 1906 a draft Code of Criminal and Civil Procedures consisting of 360 Articles was completed and submitted to the Throne for approval, which however was not obtained, because a new draft had in the meantime been prepared. Between 1906 and 1911 a draft Criminal Code, a draft Code of Civil Procedure and a draft Code of Criminal Procedure, all of which I had the honour of translating, for the first time, into English at a later date, were completed. But of all these only the Criminal Code became law in its original form. This code was divided into two parts, consisting of thirty-six Chapters and 401 Articles. Part I relates to general provisions, such as rules of application, exceptions, attempts, recedivity, concurrence of offences, joint offences, punishments, etc., while Part II relates to specific offences, the tripartite division of the French law into *Crimes,* Délits and *Contraventions,* which exists in English law in the form of felonies, misdemeanours and petty offences but which has been abandoned by most modern codes, not being followed. It was promulgated in 1912 under the name of ' Provisional Criminal Code ' at the commencement of the Republic, as a mark of the new regime, and continued to be in force until it was replaced by the Criminal Code of 1928, which has in turn been superseded by the present Criminal Code promulgated in 1935. The Code of 1928, before its adoption with some modifications, was called the Second Revised Draft, and was prepared by the Codification Commission under the presidency of Dr. Wang Chung Hui, my predecessor as judge of the Permanent Court of International Justice and the well-known translator of the German Civil Code, and who may well be called ' the Blackstone of China ', having held the

highest posts both in the judiciary and in the executive. Great pains were taken in the preparation of this draft. While the Provisional Criminal Code had been prepared with the Hungarian Criminal Code of 1878, the German Criminal Code of 1871, the Dutch Criminal Code of 1881, the Italian Criminal Code of 1889, the Egyptian Criminal Code of 1904, the Siamese Criminal Code of 1908 and the Japanese Criminal Code of 1907 as guides, the Second Revised Draft was prepared with the Austrian Draft Criminal Code of 1903, the Resolutions of the German Commission of 1914 on Criminal Law reforms, and the counter-draft submitted by certain German criminologists in 1911, as additional guides.

The second Revised Draft was certainly an improvement on the Provisional Criminal Code, which it ultimately replaced. It did not, however, introduce radical changes; for the latter was already a modern code, had worked smoothly for over a decade, and had become familiar to judges, lawyers and teachers. In the field of law scientific perfection has sometimes to be sacrificed to expediency. The improvement effected, therefore, chiefly consisted in a more logical and scientific arrangement of the provisions and better phraseology. For example, Article 10 of the Provisional Code provides, 'No act is an offence unless the same is specifically made so by law'; whereas Article 1 of the Second Revised Draft is worded as, 'No Act is an offence which is not expressly made punishable by law in force at the time when it was done'. To quote a comment of the Extraterritoriality Commission which sat in China in 1926, as a result of the Washington Conference, 'The Second Revised Draft, in addition to containing in Part I more scientific and precise provisions, also specifies in Article 62 that the judge shall take into consideration a number of mitigating circumstances in determining punishments, and Article 41 affords a more flexible scale of punishments. This draft meets most of the criticisms of the Provisional Criminal Code made by the Commission at its sessions'.

The present Criminal Code, enforced since 1935, is even more advanced in modern criminology than its predecessor, having benefited, on the one hand, by the experience gained during the twenty-five years preceding its appearance and, on the other, by the scientific progress in criminology since the First World War. Like its predecessor, it was divided into two parts;

Part I, consisting of twelve Chapters and ninety-nine Articles, relates to Rules of Application of the Law, Criminal Liability, Attempt, Joint Offenders, Punishments, Recedivity, Concurrence of Punishments, Judicial Discretion as to Punishments, Suspension of Punishments, Conditional Release, Prescription and Measures of Security, the last of which is, according to a note appended to the English text of the code, somewhat similar to 'liberty under supervision' in Article 219 of the Italian Penal Code. Part II, consisting of thirty-five Chapters and 258 Articles, relates to specific offences. It was prepared by the Legislative Yuan, under the Presidency of Dr. Sun Fo, son of Dr. Sun Yat Sen, Founder of the Republic. Being now the highest legislative organ of the Government, this Yuan has taken over the work formerly performed by the Law Codification Commission and, during the first few years after the National Government had been installed in Nanking, it inaugurated a period that may well be called 'Justinian'. Apart from a number of other legislative measures of importance, it has produced the Criminal Code, the Code of Criminal Procedure, the Civil Code, the Code of Civil Procedure, the Law of Insurance, Maritime Law, Bankruptcy Law, Company Law, the Law of Negotiable Instruments, and Banking Law.

It is impossible to give here even an outline of these codes, but a comment of Professor Kenny on the Draft Code of Criminal Procedure, which has since been brought up to date and greatly improved by the Legislative Yuan, may be quoted, *viz.* 'The draftsman of this proposed Code of Procedure has unquestionably done his work well and reflects credit upon whatever Western training has severally been received, and the policy underlying many of their provisions and the terse definitions with which all their provisions are expressed suggest that that training was often obtained in the Quartier Latin than in the Inns of Court'.

This interesting comment incidentally throws a light on the contents of the other codes now in force in China. Generally speaking, they are of the continental type. The Anglo-American system is no doubt excellent but is very difficult to imitate. It would be a formidable, if not impossible, task for a foreign jurist to try to formulate into a principle and introduce into the law of his own country such rules of English law as, for instance,

'The Rule in Shelley's Case', 'Equity acts in personam', 'The Rule in *Howe* v. *Earl of Dartmouth*' and the like, all of which are legal history as well as law. In the matter of procedure, the *White Book* would baffle even a student of English law before he reads in chambers. It is therefore understandable that when China began to codify her modern civil law, she should look for patterns, first to the continent of Europe which has furnished so many models, such as the Code Napoleon, the German Civil Code and the Swiss Code. In fact the compilers of the Chinese Civil Code have consulted, apart from those codes just mentioned, the Civil Code of Soviet Russia published in 1922, the Siamese Civil and Commercial Code, parts of which appeared in the years 1923–1925, the various modern codes of Turkey published in 1926, and a few others.

The present Civil Code is divided into five Books consisting of 1,225 Articles. Book I relates to General Principles, Book II to Obligations, Book III to Rights over Things, Book IV to the family and Book V to Succession. It may, however, be mentioned that in view of the immensity of the country and the vastness of its population, much room is left for the application of local customs, and that, except in matters concerning negotiable instruments, Insurance, Companies and Shipping, which are dealt with separately, the distinction between civil and commercial laws is not adopted; not only because the tendency in many countries points to the same direction, but also because the notion that merchants form a class of their own never existed in China.

I am now approaching the end of my lecture which, roving over such a wide field as the law reform of China, must have been very scrappy. But I cannot conclude without observing that, as law is after all a rule of human conduct, the new legislation of China, as it is based on the latest products of Western juridical science, will eventually make life much the same in China as in Western countries, forming a golden bridge through which the 'twain shall meet', and that the immense amount of constructive work that has been accomplished in the juridical field alone, within the space of a decade or two of comparative world tranquillity, shows what peace can do and how vivid is the truth in the saying that 'Peace hath her victories no less renowned than war'.

12

LAW AND ADMINISTRATION IN PRESENT-DAY JAPAN

Leslie C. Green

Before the recent war it was possible to say with truth that Japan's legal system reflected an attempt to absorb the advances of the West while preserving the traditions of Japan. For example, although there was a Criminal Code based on the German and French models it was illegal to institute criminal proceedings against one's father. On August 14, 1945 Japan agreed to unconditional surrender and on September 2 the Instrument of Surrender was signed. This instituted the regime of the occupation of which it has been said, 'The old Japan, to be sure, has been shaken—as much by the MacArthur earthquake as by the B-29 and the atomic bomb'.[1] This earthquake has had its effects on every aspect of Japanese law, private as well as public, but it is our purpose merely to trace some of the consequences on Japanese public law, paying particular attention to the Constitution and the Law of the Occupation.

In the old days, that is to say before the Meiji Restoration in 1868, there was no publication of law. Thus the Tokugawa Criminal Code expressly declared that 'the above rules have been settled with His Highness's gracious sanction, and nobody except the magistrates should be allowed to peruse them'.[2] A change from this attitude of secrecy was brought about by the promulgation of the Constitution in 1889.[3] In view of the fact that the Emperor of Japan, in an interview granted on May 27, 1947, has seen fit to declare 'that the concept of democracy was not new in Japan, since it was found in many of the country's old teachings and practices',[4] it is necessary to have some regard to the provisions of this document. In this connection it must

[1] *Present-Day Japan*, by A. T. Steele (New York, 1947), p. 1.
[2] *The New Japanese Civil Code*, by N. Hozumi (Tokyo, 1912), p. 43.
[3] Text reproduced in *The Government of Japan*, by N. Kitazawa (Princeton, 1929), pp. 117 *et seq.*
[4] *The Times* newspaper, May 28, 1947.

be borne in mind that Prince Ito, who was chiefly responsible for the drafting of the Meiji Constitution, 'studied chiefly the German and Austrian systems because he believed that the system of England was too democratic and not fitted for Japan'.[5]

By this Constitution 'the Emperor is the head of the Empire, combining in himself the rights of sovereignty'.[6] His person is 'sacred and inviolable', and he is one of 'a line of Emperors unbroken for ages eternal',[7] and he traces his descent back to the sun-goddess, Amaterasu Ōmikami, whose divinity he personifies. The powers granted to the Emperor under the Constitution were wide to the extreme and he governed with the assistance of a Privy Council of Elder Statesmen, a House of Peers, part hereditary, part elected and part appointed, and a House of Representatives elected by secret ballot. These two Houses constituted the Diet and were responsible for raising finances. Nevertheless, by Article LXX, 'when the Imperial Diet cannot be invoked, owing to the external or internal condition of the country, in case of urgent need for the maintenance of public safety, the Government may take all necessary financial measures by means of an Imperial Ordinance'. Such a provision would constitute the means by which a dictatorial element within the country could govern without Parliament behind the *façade* of Imperial benediction, for it appears that the only limit placed upon an Imperial Ordinance is its inability to amend the Constitution.

The Constitution provided that the Prime Minister should be appointed by the Emperor on the advice of the Elder Statesmen, although in more recent times the Privy Council played an increasing part. The Prime Minister was to govern through a Cabinet which did not control the army or navy. The Emperor was head of both these services which were directed by ministers appointed by the respective General Staffs and directly responsible to the Emperor himself. Since 1895 the Service Ministers have had to be ranking generals or lieutenant-generals and admirals or vice-admirals on the active list. Japan's constitutional and political history present numerous instances of Cabinets being compelled to change their policy or ministers

[5] Kitazawa, *op. cit.*, p. 23.
[6] Article IV.
[7] Articles III and I.

because one or other of the services had withdrawn its minister and refused to appoint another until its demands were met.

As a concession to its western forbears the Constitution, in Articles XVIII–XXXII, postulated the rights of the citizens. A measure of religious freedom was allowed, so long as it was ' not antagonistic to their duties as subjects '. This limitation meant that the system of Emperor worship was preserved intact. Despite the fact that Emperor worship is as old as Japan itself, General MacArthur, within two years of the surrender, seemed to think that Christianity would take hold of Japanese life and become the predominant faith. As a result of this attitude ' Christian Japanese exercise an influence in Japanese life out of proportion to their numbers ', for they constitute ' little more than one-half of one per cent of the Japanese population '.[8]

In addition, this ' fundamental law ' of the State [9] guaranteed to the citizens of Japan freedom from arbitrary arrest, together with the active freedoms of speech and correspondence, publication and association. Despite these lofty ideals a controlling measure was introduced in 1925. This Statute of Public Security was based on an Imperial Rescript ostensibly intended to deal with the alarm and despondency consequent upon the 1923 earthquake. In practice it became the means of suppressing democratic tendencies on the basis of ' dangerous thoughts '.

Whatever rights of citizens were granted and whatever provisions for representative government were made by the Constitution, the position of the Emperor was intended to be all supreme. Early in the twentieth century the learned Japanese constitutional lawyer, Dr. Minobe, had published a work in which he had described the Emperor as an ' organ ' of the State. Retribution came in 1934 when he was prosecuted and was lucky to escape with his life. It was then settled ' that the throne was absolute and supreme above all other institutions and was in fact itself the State '.[10] Such a concept reminds one of the position of the *Führer* in Nazi Germany. In his *Nazi Conception of Law* Mr. J. Walter Jones tells us that the *Führer* ' is pictured as representing no concrete person or persons. . . . He embodies some sort of

[8] *The Times* newspaper, March 18, June 30, 1947; and Steele, *op. cit.*, p. 21.

[9] Preamble of the Constitution.

[10] *A New Constitution for Japan*, by J. M. Ward (*The Australian Outlook*, 1947, Vol. 1, No. 3, p. 7 at p. 12).

transcendent unity which soars above the desires or interests of a transient majority. In and through his words and acts the nation for the first time comes to real life. His decrees are to be respected as expressing eternal truths'.[11]

Of the Meiji Constitution an Australian commentator has recently written:

> 'The intention was to establish a constitution, which, being handed down by a divine Emperor, would end discussion of political rights and civil liberties, and which would itself unmistakably reaffirm the divinity and sovereignty of the Emperor, in whose name the ruling classes designed to govern. . . .
>
> 'In operation the Constitution of 1889 amply fulfilled the intentions of its creators. The Emperor institution, progressively elevated to a semi-mystical cult, was used by shifting groups of *zaibatsu,* militarists, bureaucrats and nobility to sanctify their own policies. In varying degree, these policies aimed at the aggrandizement of Japan. Whatever particular interests were being most served by any particular policy, none of the really powerful groups in Japanese political life deviated from the line of using the Constitution and the imperial system as a mask for autocratic government. On every major occasion that the constitution had to be interpreted, the trend was away from liberalism'.[12]

Nevertheless, as we have already seen, the Emperor found it possible in 1947 to talk of democracy as being present 'in many of the country's old teachings and practices'.

In view of the manner in which the Constitution had been applied it is not surprising that the Supreme Commander for the Allied Powers saw fit, on October 11, 1945 to order the Japanese Government to take steps to 'liberalise' the Constitution. Unfortunately, however, it appeared that some of the divinity with which the Emperor was endowed had been transferred to the Constitution itself. Thus, 'the Conservatives argued that the new constitution was necessary only in order to reassure the Allies: "the old instrument", declared Keikichi Kida, "is not undemocratic if enforced in the right manner". Some

[11] Oxford, 1939, p. 8.
[12] Ward, *op. cit.*, p. 11.

Conservative speeches suggested gratification at the fact that the Meiji Constitution had been supplanted, not amended. Presumably there was a hope that, if the new constitution could be abandoned at some future date, the Meiji Constitution could be reintroduced in its pristine form '.[13]

At Cairo in 1943 Mr. Roosevelt, Mr. Churchill and General Chiang Kai-shek announced their determination ' to procure the unconditional surrender of Japan '.[14] From Potsdam in 1945 Mr. Truman, Mr. Churchill, Marshal Stalin and General Chiang Kai-shek issued a declaration telling the Japanese that the time had come for surrender or destruction, and assuring them that ' We do not intend that the Japanese shall be enslaved as a race nor destroyed as a nation, but stern justice will be meted out to all war criminals including those who have visited cruelties upon our prisoners. The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought as well as respect for fundamental human rights shall be established '.[15] To assist the Japanese in their deliberations on this matter, atomic bombs were dropped on Hiroshima and Nagasaki on August 6 and 9 respectively, and on August 14 Japan accepted the Potsdam Declaration. As a result President Truman, on behalf of the Allies, announced the appointment of General Douglas MacArthur as Supreme Commander for the Allied Powers, and here begins the period of the occupation.

Japan is a defeated country subject to enemy occupation and technically, since no peace treaty has yet been signed, a state of war still exists between her and the victorious Allies.[16] It might therefore be considered that the normal rules for the administration of occupied territory in time of war as provided by the Hague Regulations of 1907 should apply. This, however, has been avoided by the Japanese Government's acceptance of unconditional surrender giving the victors the right to annex Japan or rule it as they please. Unlike Germany, there has been no *debellatio*; in the case of Japan both a State and a Government continue to exist, and both the Government of Japan and

[13] Ward, *op. cit.*, pp. 9–10.
[14] *United Nations Documents*, 1941–1945 (London, 1946), p. 25.
[15] *Ibid.*, p. 207.
[16] *R.* v. *Bottrill, Ex p. Kuechenmeister*, [1947] 1 K.B. 41.

the Emperor function under the authority of the Supreme Commander, who personifies the unlimited authority of the Allied Powers. It is necessary to bear in mind, however, that the occupation of Japan bears many similarities to the occupation of the Rhineland, 1918–1923. We must, therefore, turn our attention to the Law of the Occupation.[0]

In the Instrument of Surrender itself is to be found the complete renunciation of the Meiji Constitution, for in this modern document one reads that 'the authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander for the Allied Powers'.[17] The system for the control of Japan was laid down at the Moscow meeting of the Foreign Ministers of the Soviet Union, the United Kingdom and the United States in December 1945.[18] Here there were established a Far Eastern Commission and an Allied Council for Japan. The Far Eastern Commission has its seat at Washington and is a policy-formulating body whose function it is to ensure that Japan carries out her obligations under the Terms of Surrender. It is also empowered to review the directives issued to the Supreme Commander, but it is obliged to bear in mind 'the chain of command from the United States Government to the Supreme Commander'; for it must not be forgotten that General MacArthur is not only the Supreme Commander and representative of the Allied Powers, but also a senior officer of the United States Armed Forces, and as such obliged to fulfil the commands of his Government.

This Moscow Declaration recognises the special position of the United States in Japan, and imposes upon its Government the duty of issuing directives in accordance with the policy decisions of the Commission. In addition, the United States may issue interim directives to General MacArthur pending action by the Commission, but no provision is made to cover the situation that may arise when the Commission refuses to confirm such a directive. The position of the Supreme Commander in this event is protected by the Presidential document on *United States Initial Post-Surrender Policy for Japan*.[19] This specifically

[0] See review of E. Fraenkel's *Military Occupation and the Rule of Law* by G. Schwarzenberger in *Law Quarterly Review* (1946), Vol. 62, p. 96.

[17] Text in *Occupation of Japan: Policy and Progress* (State Department, Washington, 1946), p. 62.

[18] *Ibid.*, pp. 69–73.

[19] *Ibid.*, pp. 73–81.

declares that ' although every effort will be made, by consultation and by constitution of appropriate advisory bodies, to establish policies for the conduct of the occupation and the control of Japan which will satisfy the principal Allied powers, in the event of any differences of opinion among them, the policies of the United States will govern '. Despite the fact that this document was issued before the Foreign Ministers met at Moscow there is no mention in their statement with regard to this particular provision, which almost leaves one with the impression that by and large the law of the United States is the law of Japan, especially as decisions of the Far Eastern Commission require the concurring votes of the United States, the Soviet Union, the United Kingdom and China, with the result that the United States can veto anything it so desires. The Allied Council for Japan is a similar body to the Far Eastern Commission, but it meets at Tokyo under the chairmanship of the Supreme Commander with whom it consults and to whom it tenders advice in connection with implementation of the Terms of Surrender.

In practice it has been United States policy rather than that of the Allies that has shaped Japan since the surrender. Thus General MacArthur has informed us that ' the United States had given Japan two fundamental concepts of American civilisation —democracy and Christianity '.[20] It is to be observed that he refers to the United States as the donor, and seems to imply that Christianity and democracy are American monopolies; there is no reference to the mission of any other ally. In fact, there seems to have been a tendency to minimise any possibility of any of the other Allies enjoying any influence in Japan, moral or otherwise. In a letter published in *The Times* newspaper on February 14, 1947 Sir Robert Clive, former British Ambassador in Tokyo, ' while pointing out that the United States was alone in a position to supply Japan with the cotton and money essential to her economy, drew attention to the great respect in which Britain was held by Japan in the past, and emphasised his desire to see British interests revived there '. This letter was to have been published in Tokyo on February 21, but the American military censors banned it. After protests this ban was raised.[21] A similar incident arose in connection with the ban placed upon the

[20] *The Times* newspaper, June 30, 1947.
[21] *Ibid.*, February 22 and 25, 1947.

holding of a ceremonial parade by the British Commonwealth Occupation Force on Anzac Day, 1947, on the grounds that it came within the terms of an order banning 'any public ceremonial which might offend or distress the Japanese'. A protest from Australia resulted in the ban being lifted. It is interesting to recall in this connection that an Acting Chaplain wrote to *The Times* newspaper pointing out that while he was a prisoner of war the Japanese permitted him to hold an annual Anzac Day service in the camp.[22]

The instrument upon which General MacArthur's occupation has been based is the *United States Initial Post-Surrender Policy for Japan*, already mentioned. The chief principle therein embodied is that steps must be taken to ensure that Japan is never again able to become 'a menace to the United States', and also

> 'To bring about the eventual establishment of a peaceful and responsible government which will respect the rights of other states and will support the objectives of the United States as reflected in the ideals and principles of the Charter of the United Nations. The United States desires that this government should conform as closely as may be to principles of democratic self-government but it is not the responsibility of the Allied Powers to impose upon Japan any form of government not suggested by the freely expressed will of the people'.

Nevertheless, during the election campaign of 1947 the United States' authorities dropped generous hints as to their dislike of communism, with the result that while all the previous ministers were elected only four communists were returned. This led *The Times* newspaper to write in its editorial of April 29, 1947: 'Broadly speaking, the nature and the result of these contests are hardly reassuring to those who held that the Japanese people would readily assimilate western democracy when they were afforded the opportunity of doing so. . . . The Communists have suffered a decisive defeat all along the line, to which the frankly critical attitude of the Allied Command unquestionably contributed'.

The basic principle of General MacArthur's rule—and that it is a 'rule' is obvious from the comment of the Foreign

[22] *Ibid.*, April 11 and 14, 1947.

Correspondent of the *New York Herald Tribune* newspaper that 'unquestionably his aloof, almost regal, bearing has contributed to his great prestige with the Japanese. . . . Today it is easier to get the Japanese to talk freely about the emperor than about MacArthur'[23]—is that he 'will exercise his authority through Japanese governmental machinery and agencies. . . . The Japanese Government will be permitted, under his instructions, to exercise the normal powers of government in matters of domestic administration. . . . The policy is to use the existing form of Government in Japan, not to support it'. It is a little difficult to see the difference between supporting and using in this case; for in a completely occupied country it is clear that the people are bound to assume that the occupying authorities must be in support of the governmental organs through which they rule, and in view of the high personal prestige enjoyed by General MacArthur this is assuredly so in Japan. In other words, use of the existing governmental machinery must tend to stabilise the political *status quo*.

It is probably hardly necessary to say that this policy directive provides for the complete disarmament and demilitarisation of Japan. This is to be effected not merely by means of the destruction or confiscation of armaments, arsenals and munition works, and the prohibition of armed forces. In addition to all these, the anti-democratic laws have been repealed and an attempt has been made to strike at those who preach militarism. 'Persons who have been active exponents of militarism and militant nationalism will be removed and excluded from public office and from any other position of public or substantial private responsibility. Ultra-nationalistic or militaristic social, political, professional and commercial societies and institutions will be dissolved and prohibited'. A similar policy was enunciated in connection with rendering the economic life of Japan more democratic. The economic side of this programme was introduced as early as November 1945 and involved the breaking

[23] Steele, *op. cit.*, pp. 18–23. See also *The Times* newspaper, February 4, 1948, for the report of a speech in which Brigadier Quilliam, chief New Zealand prosecutor at the Tokyo Trial, said 'The Emperor has renounced his divinity. It has been taken up by General MacArthur'; and the Report of the Korea Commission of the United Nations to the Little Assembly, February 19, 1948: 'Hodge-baiting, the fashionable hobby in Korea, is a more healthy sign of democracy than MacArthur worship in Japan', *Chronology of International Events* (London, 1948), Vol. 4, p. 131.

down of monopolies and cartels, and by May 1947 some 1,200 firms had been affected by it.[24] The military part of the programme was initiated by a directive of January 4, 1946 from General MacArthur to the Japanese Government.[25] This proscribed any organisation which, among other obnoxious habits, indulged in opposition to occupation law, supported or justified aggressive Japanese policies, advocated Japanese leadership of Asiatic peoples, or believed in government by assassination. Furthermore, any organisation more than 25 per cent of whose members belonged to a proscribed organisation was itself proscribed, as were any whose principal officers belonged to such organisations or were commissioned officers of the armed forces. Under this order some 1,300 organisations have been suppressed, and to ensure enforcement in the future any new organisation whose ' purpose or activity consists of :

(a) proposing or supporting candidates for public office ;
(b) influencing the policy of Government ; or
(c) the discussion of the relations between Japan and foreign powers ',

must file a detailed report including the names of its members and the source of its funds. This report is not required from legitimate trade unions. This directive did not only strike at organisations, but removed persons from office, and forbade them from holding office in the future, and in some cases this has even extended to the members of their families. By September 1947 some 200,000 people had been removed under this law. The grounds for removal include the holding of important positions in proscribed organisations or in occupied territory, possession of a commission in the regular forces, and connection with the naval or military police or any secret intelligence organisation. This was intended to strike at members of the *Kempeitai* about whose brutality so much has been heard from returned prisoners of war.[0] In addition, persons suffer if they denounced opponents of the militaristic regime or organised or perpetrated acts of violence against them, or have played an active role in, or been active exponents of, militant nationalism and aggression. This

[24] *The Results of the Allied Occupation of Japan,* by E. M. Martin (New York, 1947), p. 45.
[25] *Ibid.,* pp. 32 *et seq.*
[0] For a study of the *Kempeitai* in action, see *The Double Tenth Trial,* by B. A. Mallal (Singapore, 1947).

demilitarisation programme was taken further by a decision taken by the Far Eastern Commission on February 12, 1948. This decision calls for the destruction of all military and secret police personnel records and forbids their compilation in the future. In addition, it prohibits all special privileges for Japanese ex-servicemen, and forbids the re-establishment of the war and navy ministries.[00]

Associated with this 'purge law' is the decision of the Imperial Household Council on October 14, 1947 to deprive fifty-one imperial princes and princesses of their imperial rank. All of these newly created commoners are forbidden from holding any public office as military men. Among them is the former Prince Higashikuni who was the first Prime Minister under the occupation. Today, instead of being a respected Elder Statesman, he operates a grocery business in a black market district of Tokyo.[26]

Study of the demilitarisation policy and campaign raises the problem of the treatment of war criminals. As was made clear in connection with German war criminals there are two types of war criminal and two types of tribunal for trying them. There are those who are guilty of war crimes in the conventional sense and those whose offences are so heinous that they must be tried by a specially created court of an international character. This was no less true of Japan than it was of Germany. War crimes tribunals were set up throughout the area that had formerly been under Japanese occupation and trial and punishment proceeded apace; while an International Military Tribunal was established in Tokyo. In view of this division it is difficult to appreciate the reason why on September 1, 1947 it was announced that twenty-three major war criminals had been released because 'although investigation of their activities revealed ample justification for their arrest, it did not warrant their being tried by an international tribunal'.[27] But why were they not tried before the lesser tribunals?

Unlike their counterparts in Germany, and unlike the Nuremberg Tribunal, these lesser tribunals in the Far East seem to be prepared to accept the defence of superior orders. Among

[00] United States Information Service, *Daily Wireless Bulletin*, No. 641, March 24, 1948.
[26] *The Times* newspaper, October 17, 1947.
[27] *The Times* newspaper, September 2, 1947.

those already tried is Lieutenant-General Kato who was charged with war crimes in the traditional sense, namely ill-treatment of prisoners of war. In his defence he called his superior officer, General Imamura, who said, as he had done in other trials in which he had been called as a defence witness, 'I take full responsibility, and Kato acted under orders issued by myself'. The tribunal accepted this and found Kato not guilty, while Imamura was sentenced, at his own trial, to only ten years.[28] Had Kato been an ordinary private who had been ordered by his commanding general to carry out certain acts which were illegal, it might have been possible to make out a case for his plea of superior orders to be accepted, but it is difficult to argue in this way when the accused is himself a senior officer. With due deference to the tribunal concerned, it is submitted that in such circumstances the plea should not be accepted to mitigate the punishment, let alone to excuse the offence.

The International Military Tribunal at Tokyo was established to try 'those persons charged individually, or as members of organisations, or in both capacities, with offences which include crimes against peace'.[29] This tribunal, like that at Nuremberg, possesses jurisdiction to try crimes against peace, including the preparation and waging of aggressive war, war crimes and crimes against humanity; but unlike its European counterpart it was not established as the result of an international agreement. Instead, General MacArthur issued a Proclamation in which he stated, 'I, Douglas MacArthur, as Supreme Commander for the Allied Powers . . . do order and provide (that) there shall be established an International Military Tribunal for the Far East'.[30] This tribunal was international only in the sense that war crimes are tried in accordance with international law, and that its bench was composed of eleven judges representing the members of the Far Eastern Commission. The Philippine member of the tribunal considers that it will accomplish more than did the Nuremberg Tribunal, for 'eleven nations, representing a wider variety of legal tradition, form the Tokyo tribunal, whereas judges from only four nations formed the court

[28] *The Times* newspaper, May 1 and 17, 1947.
[29] SCAP Special Proclamation, January 19, 1946. *Occupation of Japan: Policy and Progress*, pp. 146–147.
[30] *L.c.*

at Nuremberg'.[31] It must not be forgotten, however, that judges from each of these four nations are members of the International Court of Justice, and in the election of judges for this court by the Security Council six is the minimum number of votes to secure election. The Security Council at its ninth meeting elected judges and the Philippine judge who had been nominated received only one vote.[32]

In accordance with the Charter of the Tribunal the accused are guaranteed a fair trial, including the right to be represented by counsel and to present evidence 'subject to such reasonable restrictions as the tribunal may determine'. In practice, however, some strange things have occurred. On March 5, 1947 the President of the Court ordered one of the American counsel associated with the defence to confine 'his examination-in-chief of a witness to matters referred to by the prosecution'. Counsel objected to this, expressing a desire 'to take exception to undue interference by the tribunal with the oral examination of a witness'. When he refused to withdraw this statement he was suspended and ordered to leave the court. After his departure senior Japanese defence counsel applied for an adjournment to consider 'this unexpected incident', but this was refused by the court. On another occasion, the tribunal refused to admit affidavits on behalf of the defence sworn by Mr. Joseph C. Grew, former United States Ambassador in Tokyo, and Major-General Piggott, formerly British military attaché, while admitting one sworn by Ribbentrop the day before he was hanged.[33]

It is a general principle of law recognised by civilised nations, and as such part of international law, that a statement made by an accused as a result of threats, promises or inducements held out to him to secure such a statement cannot be used against him at his trial. The only limitation to this principle is that the person holding out the temptation must be in a position of such authority that the accused can legitimately presume he has the power to fulfil his threat or promise. It is surely not illogical to suggest that any Japanese war criminal interviewed by an Allied representative would be correct in assuming that such representative enjoyed the powers of carrying out his assurance,

[31] United States Information Service, *Daily Wireless Bulletin,* No. 298, January 25, 1947.
[32] *Journal of the Security Council,* First Year, No. 9, p. 145.
[33] *The Times* newspaper, March 6, June 21 and September 26, 1947.

for only selected personnel actually concerned with these criminals have anything to do with them. The Tokyo Tribunal, however, rejected 'a submission by the defence, which was unopposed by the prosecution, that statements made by one of the accused, after he had been assured that those statements would not be used against him, should be struck from the record'.[34] Perhaps the strangest thing of all in connection with the Tokyo Tribunal has been the failure to indict the Emperor 'for reasons of high political expediency', despite the accumulation of evidence implicating him in the preparation of aggressive war.[0]

The extent of the destruction and havoc wrought by the MacArthur earthquake to the traditions and ways of Japan can be seen from the Rescript issued by the Emperor on New Year's Day, 1946. This document reminded the Japanese people of the accession promises of the Emperor Meiji, and went on to declare that 'the ties between us and our people have always stood upon mutual trust and affection. They do not depend upon mere legends and myths. They are not predicated on the false conception that the Emperor is divine and that the Japanese people are superior to other races and fated to rule the world'.[35] Further blows at the divinity of the Emperor were struck by the demilitarisation directive already discussed and the revised Criminal Code. By the former, 'while not abolished, Shinto, the religion which had been used as a vehicle for glorifying the State, the Emperor, and the destiny of Japan as world-ruler, was deprived of all governmental connections and financial support'. By the revised Criminal Code the crime of *lèse-majeste* has been abolished, and the Emperor has been placed, in the eyes of the law, on the same level as ordinary people. His only privilege is that he need not himself sign a complaint seeking legal redress, this may be done by the Prime Minister.[36]

In keeping with the new regime intended to establish democracy in Japan a new Constitution came into effect on May 3, 1947. Before this date, however, a number of laws were

[34] *Ibid.*, September 26, 1947.
[0] *Ibid.*, January 15, 1948.
[35] *Occupation of Japan: Policy and Progress*, p. 135. In this connection, see *The Times* newspaper, February 4, 1948, for the report of the speech of Brigadier Quilliam referred to in note 23 above.
[36] Martin, *op. cit.*, p. 33; *The Times* newspaper, December 2, 1947.

enacted at the Ninety-First Extraordinary Diet Session, November 26–December 25, 1946, intended to give effect to various articles of the Constitution when it should come into force.[37] By the Cabinet Law the collective responsibility of the Cabinet to the Diet is expressly ordained. Of more revolutionary effect from the point of view of constitutional law is the Imperial House Law which covers all matters relating to succession to the throne, and the status and membership of the Imperial Family. Probably the most important provision of this law is that which subjects the members of the Imperial Family to the laws of Japan in their status as private citizens, and provides that all expenses of the Imperial Household are to be appropriated in the annual budgets. Two closely related laws are the House of Councillors Election Law and the Diet Law. The former provides for an Upper House of 250 members, half to be elected each three years for six-year periods. The latter provides protection against arrest to members of the Diet for acts done in the Diet, and it also sets up a legislative Court of Impeachment for the trial of judges. In addition to these there was passed a Local Autonomy Law aimed at the decentralisation of public authority by providing for the election of local councils, but the first elections 'appear to have resulted largely in putting back into office the officials previously appointed from Tokyo'.[38]

Of more importance than all of these laws is the new Constitution,[39] which by Article XCIV is the 'supreme law of the state and no public law or ordinance and no imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity'. By Article XCVI, however, amendment of this 'supreme law' is effected by a two-thirds vote of all the members of each House. It is therefore possible for the Japanese to amend their new Constitution out of existence and reintroduce that of the Meiji era, but this is not likely to occur so long as the occupation continues.

The Preamble of the Constitution declares:

> 'We, the Japanese people, acting through our duly elected representatives in the National Diet, determined

[37] These laws are summarised in Martin, *op. cit.*, pp. 41–42.
[38] *Op. cit.*, p. 43.
[39] *Occupation of Japan: Policy and Progress*, pp. 117–132.

that we shall secure for ourselves and our posterity the fruits of peaceful co-operation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited with the horrors of war through the action of government, do proclaim the sovereignty of the people's will and do ordain and establish this Constitution, founded upon the universal principle that government is a sacred trust the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people; and we reject and revoke all constitutions, laws and ordinances in conflict herewith.

'Desiring peace for all time and fully conscious of the high ideals controlling human relationship now stirring mankind, we have determined to rely for our security and survival upon the justice and good faith of the peace-loving peoples of the world. . . . We recognise and acknowledge that all peoples have the right to live in peace, free from fear and want'.

The sentiments of this Preamble are sufficient to cause the spirits of the Emperor Meiji and Prince Ito to commit *seppuku,* more commonly known in the West as *hara kiri,* and it is not surprising that it met with conservative opposition.

Conservative opinion could not have been comforted in any way by the assertion in Article I that 'the Emperor shall be the symbol of the state and of the unity of the people, deriving his position from the sovereign will of the people'. What a change from 1889! Furthermore, all acts of the Emperor are to be performed with 'the advice and approval of the Cabinet, . . . and the Cabinet shall be responsible therefor'.

Far more important to the rest of the world is Article IX which solemnly stipulates that 'War, as a sovereign right of the nation and the threat or use of force, is forever renounced as a means of settling disputes with other nations. The maintenance of land, sea and air forces, as well as other war potential, will never be authorised. The right of belligerency of the state will not be recognised'. This is the first time that any such comprehensive renunciation of war has ever been embodied in a national constitution, either in the west or the east. As early as 1791, however, the French Constitution in Article IV renounced

aggressive war and this renunciation was reproduced in the Constitution of 1848. A similar principle was embodied into the Constitution of Brazil in 1928, while Article VI of the Constitution of the Spanish Republic promulgated on December 9, 1931 renounced war as an instrument of national policy. None of these constitutions, however, forbade the maintenance of armed forces. The sentiment does not, however, appear to be fully shared by the Japanese people. In June 1947 the then Prime Minister of Japan stated, ' I would certainly like to see our hands on any territory formerly administered by the central Japanese Government '.[40] As this would include Singapore, Burma, the Philippines, Korea, Formosa, Manchuria and all territories other than the four islands of Honshu, Hokkaido, Kyushu and Shikoku, declared at Potsdam to be under Japanese sovereignty, it is difficult to appreciate how this could be effected other than by means of war. Prior to this statement General MacArthur had declared that ' Japan today understood perhaps better than any other country in the world that war did not pay '.[41] It must therefore have come as a shock to him when the Japanese chief of the treaty bureau at the Ministry of Foreign Affairs asserted that ' Japan, who had " not been conquered ", would not stand as a defendant before the four great powers, or before all the allied nations, at the peace conference '. The speaker paid for his indiscretion with dismissal.[42]

Under this new Constitution government is carried on by two elected Houses, one of Representatives and the other of Councillors. This latter replaces the House of Peers and no new peers are to be created. The budget must be first submitted to the Representatives, but the authority of the Diet in this connection is not complete. ' The cost of providing facilities for the army of occupation is putting a heavy strain on Japan's national finances. . . . Since American censorship forbids the Japanese Government to publish figures on these expenditures they are covered up in the budgetary estimates under a general heading *Cost of Terminating the War* '.[43] The Prime Minister is designated by a Resolution of the Diet, and with its approval appoints his Ministers. These constitute the Cabinet in whom

[40] *The Times* newspaper, June 30, 1947.
[41] *Ibid.*, March 18, 1947.
[42] *Ibid.*, October 24 and 28, 1947.
[43] Steele, *op. cit.*, p. 13.

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